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Criminal Procedure - Mississippi's New Procedure for Raising Ineffective Counsel Claims - Read v. State

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CRIMINAL PROCEDURE – Mississippi's New Procedure For Raising Ineffective Counsel Claims – *Read v. State*, 430 So. 2d 832 (Miss. 1983).

FACTS

On May 24, 1980, John and Cathy Read were arrested for possession with intent to deliver a controlled substance when a search of their house in Jackson County yielded over 5,000 dosage units of various drugs. The Reads were jointly indicted, tried, and convicted in the Circuit Court of Jackson County for possession with intent to deliver a controlled substance. John Read was sentenced to serve 15 years in the custody of the Mississippi Department of Corrections and pay a fine of $15,000. Cathy Read received a 10-year sentence plus a $5,000 fine. The Reads were represented at the trial by four attorneys, two from Florida and two from the Mississippi Gulf Coast. The Reads appealed to the Mississippi Supreme Court and assigned five errors in the trial below.[1]

The supreme court examined all five assignments of error and found four of them to be without merit, based upon the record. The fifth assignment of error was that the Reads were denied effective counsel. The court was unable to resolve this issue based solely on the record before it. Therefore, the court affirmed the conviction "without prejudice to the Reads' right via proper postconviction proceedings to litigate fully, if they wish to do so, their claim that at trial they were denied the effective assistance of counsel."[2]

In deciding *Read v. State* in this particular manner, the Mississippi Supreme Court established a new procedure for raising claims of ineffective assistance of counsel.[3] This new procedure is largely a clarification and consolidation of the previous piecemeal system for challenging a criminal conviction based upon the ineffectiveness issue.

BACKGROUND AND ANALYSIS

A. Effective Counsel as a Right

Ineffective assistance of counsel claims raise many difficult procedural and substantive issues. Since 1932, when the United States Supreme Court issued its ruling in *Powell v. Alabama*,[4] courts have been faced with the proposition that the sixth amendment

1. Read v. State, 430 So. 2d 832, 833 (Miss. 1983).

2. *Id.* at 837.

3. This note deals solely with the ineffective assistance of counsel issue, beginning with Part II, page 836, of the opinion.

4. 287 U.S. 45 (1932).

right of counsel includes the requirement that such counsel must be "effective."[5] While *Powell* required court appointment of effective counsel in most, if not all, capital cases,[6] that right was not extended to all criminal prosecutions until *Gideon v. Wainwright*[7] was decided in 1963.

It is reasonable to assume that the broad sweep of the *Gideon* decision resulted in a rapid increase in the number of attorneys who were pressed into service to represent criminal defendants. The *Gideon* decision was probably the single greatest cause for a sudden growth in the 1960's of the number of challenges citing ineffective counsel as grounds for reversal of criminal convictions.[8] Statistics gathered from the reported decisions of the federal circuit courts of appeals show an increase in the number of ineffectiveness claims being made to those courts by criminal defendants.[9]

Several commentators believe that at least some claims of ineffective counsel are justified.[10] For example, the low pay for appointed counsel[11] and the youth and inexperience of many criminal lawyers[12] are cited as primary reasons for the need to closely examine ineffectiveness claims. Further support comes from Chief Justice Burger of the United States Supreme Court. While he was serving on the United States Court of Appeals for the District of Columbia Circuit, Judge Burger told the American College of Trial

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5. *Id.* at 71.

6. *Id.*

7. 372 U.S. 335 (1963).

8. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 444-45 (1977). The author notes that at approximately the same time Gideon was decided, the U.S. Supreme Court was expanding defendants' postconviction collateral attack alternatives and was extending other due process guarantees to defendants. The result was that the criminal trial became more complex and defendants had more avenues for attacking convictions at precisely the time when more attorneys, some perhaps ill-equipped as criminal lawyers, were working on criminal cases.

9. *Id.* at 445 n.8. Professor Strazzella makes a compelling argument by demonstrating that incompetent counsel claims in the federal circuits increased 262% for the period 1969-71 compared to 1963-65.

10. Even a cursory search of the literature on this subject will reveal over three dozen law review articles and extensive annotations published in just the last few years. *See, e.g.*, Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L. REV. 299 (1983); Schwarzer, *Dealing with Incompetent Counsel - The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); Comment, *Ineffective Counsel's Last Act Appeal?: An Ethical Dilemma of Conflicting Interests*, 1979 ARIZ. ST. L.J. 595; Special Project, *Ineffective Representation as a Basis for Relief from Conviction: Principles of Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1 (1977); Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053 (1980); Note, *Ineffective Assistance of Counsel: The Lingering Debate*, 65 CORNELL L. REV. 659 (1980); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752 (1980); Annot., 15 A.L.R. 4th 582 (1982); Annot., 2 A.L.R. 4th 27 (1980); Annot., 26 A.L.R. FED. 218 (1976).

11. Williams and Bost, *The Assigned Counsel System: An Exercise of Servitude*, 42 MISS. L.J. 32, 38-39 (1971) (comparing assignment as counsel to slave labor with its inefficiency and lack of incentive).

12. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 306-07 (1965) (dealing with youth and inexperience as major "intrinsic ineffectiveness" factors among lawyers in criminal trials).

Lawyers: "I find no pleasure in saying to you that the majority of lawyers who appear in court are so poorly trained that they are not properly performing their job, and that their manners, professional performance and ethics offend a great many people."[13]

Even when specific reasons for suspecting the effectiveness of counsel are not expressed, virtually all of the commentators, by the solutions they offer, make it clear that they believe a real problem exists.[14] They almost unanimously agree that some mechanism must be developed whereby the courts can ensure that a criminal defendant is adequately represented. This is true even though there is substantial disagreement over what constitutes ineffective counsel. This latter question relates to a substantive issue that must be addressed before procedural solutions can be meaningfully discussed.

B. What is effective counsel?

As courts have dealt with the ineffective assistance of counsel claims since *Powell* and *Gideon,* they have developed a number of standards as to what constitutes ineffective counsel. This diversity of standards is due in some measure to the previous reluctance of the United State Supreme Court to establish any national standards on the issue.[15] As a practical matter, however, the tests used in the lower federal courts and the state courts have been quite similar. Until recently, courts of most states and federal circuits had adopted a due process-based standard referred to variously as the "sham, farce, or mockery" or the "farce and mockery" standard.[16] This standard placed a heavy burden on the defendant to show that his counsel was so ineffective as to turn the trial into a "mockery of justice."[17] Although many state[18] and federal[19] courts still apply variations of this standard, it has weaknesses, not the least of which is its emphasis on the trial stage. Ineffectiveness at other stages of the prosecutorial process may also impinge upon

13. Address by Judge Burger to the Winter Convention of the American College of Trial Lawyers (April 11, 1967), printed in 5 TULSA L.J. 1, 1 (1968).

14. *See generally* Goodpaster, *supra* note 10 and Schwarzer, *supra* note 10.

15. On May 14, 1984, the United States Supreme Court adopted a standard for effective counsel. In Strickland v. Washington, No. 82-1554 (U.S. May 14, 1984), the Court adopted a sixth amendment-based "reasonableness" standard. *Id.* slip op. at 18-19. The high court specifically stated that "the minor differences in the lower courts' precise formulations of the performance standards are insignificant: The different formulations are mere variations of the overarching reasonableness standard." *Id.* slip op. at 26. *See also,* Annot., 26 A.L.R. FED. 218, 226 (1976).

16. *See generally* Finer, *Ineffective Assistance of Counsel,* 58 CORNELL L. REV. 1077, 1078 (1973) and Annot., 2 A.L.R. 4th 27 (1980) (excellent detailed discussion of the entire ineffectiveness issue and especially of the standards that the various courts at the state level have applied).

17. Parham v. State, 229 So. 2d 582, 583 (Miss. 1969); *see also* Annot., 2 A.L.R. 4th 27, 99 (1980).

18. *See* 2 A.L.R. 4th 27, 99 (1980).

19. *See* 26 A.L.R. FED. 218, 227-28 (1976).

the defendant's rights, and the "farce and mockery" standard does not adequately address those problem areas.

The current trend is clearly away from the due process type of standard toward a sixth-amendment-based reasonableness test.[20] The courts have expressed this standard by generally using the words "effective" or "competent" to describe the desired performance by counsel, but the standard is always based on reasonableness. For example, the Fifth Circuit Court of Appeals has used a standard of "counsel reasonably likely to render and rendering reasonably effective assistance."[21] The Supreme Court of California has taken the position that the defendant must be provided with reasonably competent assistance of an attorney acting as a diligent and conscientious advocate.[22] Each of these standards seems to require a two-pronged analysis of counsel's performance: 1) Was counsel intrinsically competent or effective? and 2) Did counsel in fact render reasonably competent or effective assistance?

Closely following the Fifth Circuit standard, Mississippi has recently adopted a reasonableness test in the case of *Callahan v. State.*[23] The Mississippi Supreme Court noted that several standards had been applied in this state over the years.[24] In separate decisions in 1969, for example, the court had approved a reasonableness test[25] and a "mockery of justice" test.[26] The court in *Callahan*[27] settled on the reasonableness standard cited in *Stewart v. State*[28] and used the language of the Fifth Circuit in *McKenna v. Ellis.*[29] As a result, the test in Mississippi is whether counsel is "reasonably likely to render" and does render "reasonably effective assistance."[30] The court in *Callahan* went on to state that the defendant who has demonstrated that his counsel was in fact ineffective "must show that he was prejudiced in a way that would not have come about had his rights been constitutionally protected."[31] Having thus settled, in February of 1983,

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20. *See* Special Project, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1, 37 (1977); *see also* Strickland v. Washington, No. 82-1554 (U.S. May 14, 1984).

21. McKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

22. People v. Pope, 23 Cal. 3d 412, 419, 590, P.2d 859, 866, 152 Cal. Rptr. 732, 739, (1979).

23. 426 So. 2d 801 (Miss. 1983).

24. *Id.* at 804.

25. Stewart v. State, 229 So. 2d 53, 56 (Miss. 1969).

26. Parham v. State, 229 So. 2d 582, 583 (Miss. 1969).

27. 426 So. 2d 801, 804 (Miss. 1983).

28. 229 So. 2d 53, 56 (Miss. 1969).

29. 280 F.2d 592, 599 (5th Cir. 1960).

30. *Callahan*, 426 So. 2d at 804.

31. *Id.* at 805.

on a substantive standard for gauging ineffective assistance of counsel, it was natural for the court to turn its attention to the procedural issues one month later.

C. Problems with the Mississippi Procedure Prior to Read v. State

Before the decision in *Read*, the Mississippi Supreme Court examined ineffective assistance of counsel claims by direct appeal of the conviction as well as by collateral attack. The direct appeal route was most common, and the overwhelming majority of these appeals were unsuccessful.[32] In more recent cases, the issue was also raised by petition for writ of error coram nobis.[33] These challenges met with similarly unsuccessful results.[34]

A brief review of the literature will highlight some of the theoretical and practical shortcomings of both methods. The direct appeal procedure requires the court to determine entirely from the trial record whether defense counsel was ineffective. This can prove extremely difficult since the record is frequently inadequate for a clear showing on the issue.[35] Another problem with direct appeal is that the court is being asked to rule on a claimed error often not properly preserved at the trial and which the trial court has had no opportunity to consider. Obviously, the ineffective trial counsel would seldom be expected to point out his own ineffectiveness.[36] Finally, the trial record may not, indeed probably will not, adequately reflect those actions that counsel did or did not

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32. Counsel was found not ineffective in the following cases: Hutchinson v. State, 391 So. 2d 637 (Miss. 1980); Buford v. State, 372 So. 2d 254 (Miss. 1979); Warren v. State, 369 So. 2d 483 (Miss. 1979); Rogers v. State, 307 So. 2d 551 (Miss. 1975); Miller v. State, 231 So. 2d 178 (Miss. 1970); Parham v. State, 229 So. 2d 582 (Miss. 1969); and Sims v. State, 209 Miss. 545, 47 So. 2d 849 (1950). *But see* Stewart v. State, 229 So. 2d 53 (Miss. 1969) (counsel found ineffective).

33. *See* MISS. CODE ANN. § 99-35-145 (1972). *See also* Nelson v. Tullos, 323 So. 2d 539 (Miss. 1975) (explaining that the writ of error coram nobis is the proper vehicle for postconviction relief in Mississippi). "In this jurisdiction relief for a defendant who claims to have been convicted as the result of a deprivation of his constitutional rights is by writ of error coram nobis." *Id.* at 543. The habeas corpus writ is virtually useless for postconviction collateral attack in Mississippi; *see* MISS. CODE ANN. § 11-43-1 to -5 (1972) and Nelson v. Tullos, 323 So. 2d 539, 542 (Miss. 1975) ("Unlike the boundless federal habeas corpus, the writ for habeas corpus in Mississippi is narrow in its scope and applicability.").

34. *See, e.g.*, Berry v. State, 45 So. 2d 613 (Miss. 1977) (counsel not ineffective) and Callahan v. State, 426 So. 2d 801 (Miss. 1983) (counsel not found to be ineffective, but leave granted to file a new petition for writ of error coram nobis alleging specific acts supporting claim of ineffectiveness).

35. *See* Comment, *Effective Representation - An Evasive Substantive Notion Masquerading as Procedure*, 39 WASH. L. REV. 819, 836 (1965) (pointing out the problem of "record worship" on direct appeal and encouraging appellate courts to remand ineffective assistance claims for development of an adequate record, including matters outside the trial). *See also* Schwarzer, *supra* note 10 at 642-43 (general discussion of the same problem).

36. Read v. State, 430 So. 2d 832, 838 (Miss. 1983); *See also* Comment, *Ineffective Counsel's Last Act - Appeal?: An Ethical Dilemma of Conflicting Interests*, 1979 ARIZ. ST. L.J. 595, 605 n.58 (citing responses to a survey of public defender offices).

take outside the trial phase—actions that may be critical factors in determining ineffectiveness.[37]

The collateral attack approach is no more helpful than direct appeal, except that the collateral attack does open the possibility of holding an evidentiary hearing on the ineffective counsel issue.[38] However, the postconviction attack may come months or even years after the original conviction and affirmance on appeal. The court then may be forced to overturn a conviction, because of ineffective trial counsel, at a time when the case cannot possibly be retried due to loss of witnesses or evidence.[39] In addition, allowing a postconviction attack based on the ineffectiveness issue may result in repetitive attacks, each claiming that the previous counsel was ineffective in litigating the incompetence of his predecessor.[40] Finally, an evidentiary hearing on the issue places the defendant's trial counsel in the unenviable position of testifying adversely to the interests of his former client or admitting his own incompetence.[41]

D. Options Available to the Court

When the Mississippi Supreme Court was confronted with the facts of *Read v. State*, a number of solutions were available for the peculiar problems presented by an ineffectiveness claim. Several commentators have recommended that the trial judge should become more actively involved in guarding the defendant's rights at all stages of the criminal proceedings.[42] These writers have suggested safeguards such as checklists[43] to guide criminal lawyers and cautious intervention by the judge at any point during the defendant's sojourn through the system.[44] Other writers have called for better education for criminal lawyers, coupled with

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37. *See* Comment, *supra* note 35, at 837; *see also* Waltz, *supra* note 12, at 327; and Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 939 (1973) (both emphasizing the need to examine a broad range of factors outside the actual trial when evaluating ineffectiveness claims).

38. *See, e.g.*, Goodpaster, *supra* note 10, at 355; Special Project, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review*, 13 COLUM. J.L. & SOC. PROBS. 1, 87-88 (1977).

39. *See, e.g.*, Walker v. Mitchell, 224 Va. 568, 299 S.E.2d 698 (1983); Schwarzer, *supra* note 10, at 646.

40. This problem has arisen in at least one state according to Comment, *Repetitive Post-Conviction Petitions Alleging Ineffective Assistance of Counsel: Can the Pennsylvania Supreme Court Tame the "Monster"?* 20 DUQ. L. REV. 237 (1982) (citing multiple postconviction hearing requests by defendants claiming ineffectiveness of counsel).

41. *See generally* Comment, *Ineffective Counsel's Last Act—Appeal?: An Ethical Dilemma of Conflicting Interests*, 1979 ARIZ. ST. L.J. 595.

42. *See, e.g.*, Schwarzer, *supra* note 10; Goodpaster, *supra* note 10; and Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After United States v. Decoster*, 93 HARV. L. REV. 752 (1980).

43. *See* Finer, *supra* note 16, at 1119.

44. *See, e.g.*, Goodpaster, *supra* note 10, at 358; Schwarzer, *supra* note 10, at 649-65; and Note, *supra* note 42, at 773.

special examinations and periods of apprenticeship prior to being allowed to practice in the criminal courts.[45] Arguably, the supreme court would not have the means to effectuate all possible safeguards, but it could certainly make suggestions encouraging appropriate decision makers to do so.

One commentator has proposed that ineffective counsel claims should be heard in a single evidentiary hearing resembling a habeas corpus proceeding. As a result of such a hearing, the court might apply a variety of remedial actions including reversal and new trial, civil damages, return of the fee paid to an appointed attorney, or even contempt or disbarment action against the offending attorney.[46] Even those commentators who decline to propose so radical a solution almost unanimously favor providing some type of evidentiary hearing on the matter. They acknowledge that some means must be established whereby meritorious claims of ineffective assistance of counsel will be properly resolved. A recurring theme, at least implied in several articles, is that state courts need an adequate relief mechanism because the defendant will almost certainly turn to the federal courts with a collateral attack on the state conviction.[47]

The several courts that have recently dealt with the ineffectiveness issue have adopted a variety of procedural approaches. These courts can generally be classified into two main groups: 1) those that encourage collateral attack only, and 2) those that allow both direct appeal and collateral attack. These groupings are by no means fixed, and emerging from all of the cases is one recurring theme: the reviewing court must have an adequate record upon which to base its decision on the ineffectiveness issue.

The Supreme Court of Virginia has taken perhaps the most rigid position with respect to ineffectiveness claims. In the case of *Walker v. Mitchell,*[48] that court made it clear that a claim of ineffective assistance of counsel is not cognizable on direct appeal.[49] The court stated that "the ends of justice dictate the adoption of a rule restricting to habeas corpus proceedings the litigation of claims of ineffective assistance of counsel."[50] A similarly inflexible approach has been taken by the United States Court of Ap-

45. *See* Finer, *supra* note 16, at 1116-19.
46. *See* Bines, *supra* note 37, at 976-83.
47. *Id.* at 947-48.
48. 224 Va. 568, 299 S.E.2d 698 (1983).
49. *Id.* at 567, 299 S.E. 2d at 699.
50. *Id.*

peals for the Eleventh Circuit. In *United States v. Veteto*,[51] the court ruled that the defendant cannot raise the ineffectiveness issue on direct appeal because "there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegation."[52]

The Louisiana Supreme Court has also held in recent cases that ineffectiveness claims should be heard after a habeas corpus hearing to develop the issue. In the line of cases beginning with *State v. Marcel*,[53] in 1975, the Louisiana high court made it clear that the writ of habeas corpus is the proper vehicle to use for an attack on a conviction based on ineffective counsel. However, three recent cases show that the Louisiana Supreme Court has retained its discretion to review appropriate claims on direct appeal.[54]

Appellate courts in both Minnesota and Missouri favor the collateral attack approach. In *State v. Zernechel*[55] and *State v. Lehmann*,[56] the Supreme Court of Minnesota held that it would not consider the effectiveness of trial counsel on direct appeal. The high court noted that the trial record was inadequate and stated that they "[did] not have the benefit of all the facts concerning why defense counsel did or did not do certain things."[57] Two different Missouri Courts of Appeals have specifically mentioned the need for a postconviction motion on the issue so that the defense counsel will have an opportunity to present his own evidence.[58] Both Missouri courts noted, however, that the ineffectiveness claim can be disposed of on direct appeal where the trial record has sufficient facts to allow a "meaningful review" of the issue.[59]

Two other states have also chosen a flexible stance, but both

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51. United States v. Veteto, 701 F.2d 136 (11th Cir.) (multiple defendants), *cert. denied sub nom.* Wescott v. United States, 463 U.S. 1212 (1983) (each defendant separately petitioned for certiorari).

52. *Veteto*, 701 F.2d at 140. However, the same court modified its position somewhat in a similar case decided shortly after *Veteto*. In United States v. Badolato, 701 F.2d 915 (11th Cir. 1983), the court of appeals decided an ineffectiveness claim on direct appeal where the trial court had already conducted a plenary hearing on the issue prior to the appeal and that record was available to the court.

53. 320 So. 2d 195 (La. 1975); *see also* State *ex rel.* Bailey v. City of West Monroe, 418 So. 2d 570 (La. 1982); State v. Collins, 350 So. 2d 590 (La. 1977); State v. Ross, 343 So. 2d 722 (La. 1977); State v. Mouton, 327 So. 2d 413 (La. 1976).

54. In State v. Seiss, 428 So. 2d 444 (La. 1983), the court found the trial record to be adequate and, in the interest of judicial economy, disposed of the issue on direct appeal. The fact that this will rarely occur is demonstrated by the almost simultaneous disposition of two other appeals. In State v. Rogers, 428 So. 2d 932 (La. 1983), and State v. Buckenburger, 428 So. 2d 966 (La. 1983), the Louisiana Supreme Court found the record to be inadequate for a determination on the issue and reasserted that, even though such cases are reviewable on direct appeal, the proper remedy is habeas corpus.

55. 304 N.W.2d 365 (Minn. 1981).

56. 331 N.W.2d 759 (Minn. 1983).

57. *Zernechel*, 304 N.W.2d at 367.

58. State v. Larrabee, 572 S.W.2d 250 (Mo. Ct. App. 1978); State v. Linhart, 649 S.W.2d 530 (Mo. Ct. App. 1983).

59. *Larrabee*, 572 S.W.2d at 252.

favor an evidentiary hearing in the trial court. In *Hilliard v. State*,[60] the Arkansas Supreme Court suggested that the ineffective assistance of counsel claim was best raised in a motion for new trial or postconviction relief.[61] The main benefit of such a procedure, according to that court, is to give the trial court an opportunity to "assess the quality of legal representation."[62] The Maryland Court of Appeals ruled in *Johnson v. State*[63] and *Harris v. State*[64] that the trial court is the proper forum for hearings on the issue and that a postconviction proceeding is the appropriate mechanism. The court found an evidentiary hearing and resultant record to be absolutely necessary in order to allow the appellate court to "determine intelligently whether the attorney's actions met the applicable standard of competence."[65]

All of the courts mandating habeas corpus proceedings or other postconviction relief have emphasized the need for an adequate record in evaluating ineffectiveness claims. Toward that end, those courts rely almost entirely on some type of postconviction evidentiary hearing to develop that record. At least three other courts have not gone so far toward foreclosing ineffective assistance of counsel claims on direct appeal. However, even in the courts that expressly allow such claims on direct appeal, there is a strong tendency to refuse to decide the claim absent an evidentiary hearing. In such cases, the dispositive factors seem to be the specific nature and seriousness of the claimed ineffectiveness and the quality of the record before the reviewing court.

For example, California's Supreme Court has developed the rule that where the record is adequate, an ineffectiveness claim may be disposed of on direct appeal. In the important case of *People v. Pope*,[66] the court stated the rule but went on to say that where the record sheds no light of explanation on counsel's actions, the case will otherwise be resolved with leave of the defendant to file a habeas corpus action.[67] At the hearing on that action, all evidence relating to the ineffective assistance of counsel can be developed.[68]

In *State v. Douglas*,[69] the Idaho Supreme Court likewise held

60. 259 Ark. 81, 531 S.W.2d 463 (1976).

61. *Id.* at 84, 531 S.W.2d at 464.

62. *Id.*

63. 292 Md. 405, 439 A.2d 542 (1982).

64. 295 Md. 329, 455 A.2d 979 (1983).

65. *Johnson*, 292 Md. at 434-35, 439 A.2d at 559.

66. 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979). *See* Annot., 2 A.L.R. 4th 27 (1980) (an excellent annotation on the ineffective counsel issue).

67. *Pope*, 23 Cal. 3d at 429-30, 590 P.2d at 869, 152 Cal. Rptr. at 742.

68. *Id.*

69. 97 Idaho 878, 555 P.2d 1145 (1976).

that claims of ineffective counsel may be resolved on direct appeal where the evidence is clear. Whereas the court ruled the claim valid in *Douglas,* the court was able to determine from the record in *State v. Morris,*[70] that a similar claim was groundless. But, in *State v. Tucker,*[71] the Idaho high court was unable to make a determination based on the record and so remanded the case for further evidentiary hearings on the issue.[72]

The United States Court of Appeals for the District of Columbia Circuit was able to dispose of an ineffective assistance of counsel claim on direct appeal in the case of *Godfrey v. United States.*[73] While that court acknowledged the generally preferable practice of bringing such claims under a motion that will result in an evidentiary hearing, the court stated its willingness to handle the claim on direct appeal.[74] Here again, a major determinant of the court's decision to resolve the issue on direct appeal is the nature of the claim coupled with the adequacy of the record in reflecting the merits of that claim.

Regardless of the procedural approach adopted, all of the courts cited agree that an adequate record of defense counsel's actions and the reasons for those actions is essential in determining whether counsel's assistance was effective. If an evidentiary hearing is warranted to develop that record, the courts will not hesitate to require such a hearing before adjudicating the claim. The courts will allow the defendant to present evidence of counsel's ineffectiveness not just during the trial stage but during all phases of the criminal defense process.[75] The Mississippi Supreme Court acknowledged this need for an evidentiary hearing on the ineffectiveness issue by its decision in *Read v. State.*

THE INSTANT CASE

A. An Important Threshold Question

In Part II of the opinion in *Read v. State,* Justice Robertson,

70. 97 Idaho 420, 546 P.2d 375 (1976).

71. 97 Idaho 4, 539 P.2d 556 (1975).

72. *Id.* at 13, 539 P.2d at 565.

73. 454 A.2d 293 (D.C. Cir. 1982).

74. *Id.* at 303.

75. In People v. Pope, 23 Cal. 3d 412, 424-25, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979), the California Supreme Court went so far as to list certain basic duties of effective counsel at the pre-trial phase. The list was provided for the guidance of courts holding hearings on the issue and it included the requirements that: 1) counsel diligently and actively participate in effective preparation of defendant's case, 2) counsel investigate all possible defenses of fact and law, 3) counsel confer with his client soon and often, 4) counsel advise his client of his rights and take action to preserve them, and 5) counsel seek defendant's release prior to trial and file certain appropriate motions. Similar guidance on what constitutes effective counsel at other phases of the criminal process is included in that opinion. In State v. Tucker, 97 Idaho 4, 13, 539 P.2d 556, 565 (1975), the Idaho high court also gave a lower court specific guidance on evidence to be adduced at a hearing on the ineffectiveness issue. The court instructed the trial court to hear evidence "necessary for resolution of the factual issue." This included allowing the trial counsel to testify as to the representation he rendered.

writing for eight[76] members of the Mississippi Supreme Court, first dealt with two important procedural issues related to the ineffective assistance of counsel claim. The first of the issues was the procedural bar rule. That matter had to be resolved before the court could discuss the new procedure, and a substantial portion of the decision was devoted to eliminating the rule as a bar to this type of appeal.

The court first noted that normally the procedural bar rule would prohibit the defendant from raising an issue on direct appeal that had not been properly preserved in the trial court.[77] Compelling reasons were advanced to support the court's decision that the rule should not apply to ineffectiveness claims.[78] The opinion noted that the defendant who is represented by ineffective counsel has no meaningful opportunity to raise the issue at trial.[79] Further, the court cited *Brooks v. State*[80] for the proposition that errors affecting fundamental rights are exceptions to the procedural bar rule.[81] The court also noted the historical fact that the ineffectiveness issue has been repeatedly raised and dealt with on direct appeal without being preserved at trial.[82] Finally, the court cited previous cases that have presented right to counsel claims via postconviction proceedings even when the issue was never raised at the trial or on direct appeal.[83] The court's conclusion was that the rule must not be used to bar ineffectiveness claims simply because objections to counsel's effectiveness were not previously raised.

Nor would the court consider the claim to be waived by the defendant, since he has never had a "meaningful and realistic opportunity to assert the right."[84] The court's reasoning on this issue was based as much on reality and logic as on precedent, since this was the first time the procedural bar and waiver issue had been before the court on an ineffectiveness claim. As a practical matter, the court can never be certain that the defendant has "intelligently and voluntarily" declined to assert his right to effective counsel.[85] The court observed that the ineffective lawyer is the very one charged with timely presentation of issues and ex-

76. Justice Dan Lee concurred in the result only; *Read*, 430 So. 2d at 842.
77. *Read*, 430 So. 2d at 838.
78. *Id.* at 836-37.
79. *Id.* at 837.
80. 209 Miss. 150, 46 So. 2d 94 (1950).
81. *Id.* at 155, 46 So. 2d at 97.
82. *Read*, 430 So. 2d at 838.
83. *Id.*
84. *Id.*
85. *Id.*

planation of rights to his client. The burden would be on the defendant to know that his counsel was ineffective and to raise the issue.[86] In addition, since the court is concerned with the totality of counsel's performance, "the earliest sensible time to raise the ineffectiveness issue is after the jury has returned its verdict."[87] Logically, then, the application of the waiver rule would work "to deny the defendant a bite of an apple he is constitutionally entitled to bite."[88]

The court concluded the discussion of the procedural bar/waiver issue with an appeal to juridical logic. It noted that the access to effective counsel is a *right* secured to the defendant. On the other hand, the procedural rules under discussion are based upon the state's "reasonable and legitimate interest" in judicial efficiency.[89] If rights must give way to mere interests, they cease to be rights, and "[t]he right to effective assistance of counsel cannot . . . be made less than a right."[90] Therefore, the court cannot allow claims of this nature to be prohibited by mere rules. Although a defendant may be entitled to but one bite of the apple, "he is constitutionally entitled to [that one] bite."[91]

B. Mississippi's New Procedure

Having disposed of this important threshold issue, the court then turned its attention to delineating a procedure that would best secure the defendant's one bite of the apple. The court adopted a procedural format similar to that used by several other jurisdictions. However, the Mississippi procedure places a strong emphasis on the direct appeal route.

First, the Mississippi Supreme Court found that the issue of ineffective assistance of counsel may be raised on direct appeal.[92] If the record is sufficient to support the claimed ineffectiveness, the court may reverse and remand as it did in *Brooks v. State*[93] and *Stewart v. State*.[94]

Second, where the issue is not clear from the trial record, as was the case in *Read,* the reviewing court should first decide all the other issues in the case. In the event of reversal of another issue, the ineffectiveness claim becomes moot. Conversely, where

86. *Id.*
87. *Id.* at 839.
88. *Id.*
89. *Id.* at 840.
90. *Id.*
91. *Id.*
92. *Id.* at 841.
93. 209 Miss. 150, 46 So. 2d 94 (1950) (complete inaction by defense counsel).
94. 229 So. 2d 53 (Miss. 1969) (defense attorney did nothing at all for defendant until after the verdict).

the court affirms on all the other issues, the conviction will be affirmed without prejudice to the defendant's right to raise the issue of ineffectiveness in a proper postconviction proceeding. This was the result reached in *Read*.[95] Even in this second situation, the court still might be able to decide the issue on its merits where the parties stipulate that the record is adequate, and the court finds that further evidence is not needed from the trial court level.[96]

Finally, if the reviewing court has otherwise affirmed and the defendant pursues a postconviction remedy, certain procedures will be invoked. The defendant's application for postconviction relief must state a prima facie claim of ineffective assistance of counsel. That claim will entitle the defendant to an evidentiary hearing on the merits of his claim in the trial court in which he was originally convicted.[97] The substantive standards in *Callahan v. State*[98] will be applied when the defendant files for such postconviction relief. These standards dictate that the defendant must cite specific allegations of ineffectiveness occurring at the pretrial, trial, or appeal stages.[99] At the evidentiary hearing, then, the trial judge will undertake two lines of inquiry. First, he must hear evidence regarding whether the counsel was reasonably likely to render reasonably effective assistance.[100] Then the trial court must inquire whether "counsel *in fact* rendered reasonably effective assistance in that case."[101] The result of that two-pronged inquiry will be a decision by the trial court on the granting of postconviction relief, and that decision is, of course, subject to appeal.[102]

The court anticipates that this new procedure will be efficient. Many cases raising the ineffectiveness issue can be disposed of on direct appeal. Of those that cannot be appealed directly, only the cases which are otherwise affirmed will require an evidentiary hearing. Even then, such a hearing will not result unless the defendant pursues a proper postconviction remedy.[103] The court concluded by reiterating that such a procedure is necessary because "every convicted defendant has the absolute right to one mean-

95. 430 So. 2d at 841.
96. *Id.*
97. *Id.*
98. 426 So. 2d 801 (Miss. 1983).
99. *Id.* at 804-06. A similar requirement that the defendant must cite specific instances of ineffectiveness was very recently adopted by the United States Supreme Court in United States v. Cronic, No. 82-660, slip op. at 18 (U.S. May 14, 1984).
100. *Callahan*, 426 So. 2d at 804-05.
101. *Id.* at 805.
102. *Read*, 430 So. 2d at 842.
103. *Id.*

ingful opportunity to present his claim of ineffective assistance of counsel."[104] That absolute right includes one opportunity for an evidentiary hearing on the issue.[105]

CONCLUSION

The Mississippi Supreme Court has taken a progressive approach to resolving the difficult questions raised in a defendant's claim of ineffective counsel. The new procedure outlined in *Read v. State* emphasizes the role of direct appeal, but the absolute right to an evidentiary hearing on the ineffectiveness issue, characteristic of the progressive trend in other jurisdictions, is preserved. By adopting a procedure that allows direct appeals while providing for evidentiary hearings when necessary, the court maximizes the advantages of each route.

One important question not answered by *Read v. State* involves the defendant's right to have appointed counsel while seeking postconviction relief after his appeal. As recently as November, 1982, the Mississippi Supreme Court affirmed a trial judge's refusal to appoint counsel for an indigent prisoner seeking postconviction relief.[106] In *Neal v. State,* the indigent defendant had requested court appointed counsel to assist him in filing a petition for writ of error coram nobis. The high court ruled that, while the defendant does have the right to appointed counsel at trial and on appeal, he does not have such a right in discretionary or collateral proceedings.[107] An indigent defendant might find his appeal affirmed without prejudice to his right to seek postconviction relief based on an ineffectiveness claim such as in *Read.* And yet, under *Neal,* that same defendant might have the postconviction avenue effectively closed due to lack of appointed counsel to guide him. Since the court has stated that the defendant has an absolute right to pursue the ineffectiveness issue via postconviction remedy, it seems likely that the *Neal* holding will have to be modified in the future to allow the defendant to have appointed counsel to protect that right. The presence of appointed counsel at the evidentiary hearing on the ineffectiveness claim appears to be a necessary adjunct to securing this important right.

Another question that may arise as a result of the *Read* decision is similarly vexing. How many times may the defendant assert the ineffective assistance of counsel claim? Assuming a defen-

104. *Id.*
105. *Id.*
106. *See* Neal v. State, 422 So. 2d 747 (Miss. 1982).
107. *Id.* at 748.

dant complied with the new procedure, may he not then go back and challenge the effectiveness of the attorney who represented him on his appeal and at the evidentiary hearing? Each time the defendant asserts the claim, he would be attempting to show that, due to a series of ineffective attorneys, he has never actually had an opportunity to show that his trial counsel was ineffective. Such a "revolving door" situation has arisen in at least one state which guaranteed a postconviction hearing on the ineffectiveness issue.[108] The Mississippi Supreme Court may need to give additional guidance to the trial courts conducting the evidentiary hearings, in order to reduce or eliminate the possibility that such a hearing will not be a final settlement of the issue.[109]

The court's decision in *Read v. State* is certainly not a panacea to solve all the problems caused by ineffective assistance of counsel. No single case can cover all the possibilities. However, the new procedure established in this case is an improvement over the previous piecemeal system in helping to secure defendant's one bite of the constitutional apple.

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108. *See* Comment, *supra* note 39.

109. The court might instruct the trial court judges to intervene more freely in such hearings to ensure that defendant's counsel at that hearing is effective. Such intervention would be far less objectionable in this context than in the original trial. The Mississippi Supreme Court has used a similar procedure in instructing trial judges to ensure the trial record reflects that defendant did not desire to testify in his own behalf. *See* Culberson v. State, 412 So. 2d 1184, 1186 (Miss. 1982).