In 1949 the United States Supreme Court took the position in *Young v. Ragen*\(^1\) that it was incumbent upon the states to provide some clear, meaningful avenue for prisoners to seek review of claims that their federal constitutional rights had been violated.\(^2\) In the succeeding years the states responded by establishing procedures for postconviction review of criminal convictions, procedures that by virtue of their broader scope largely supplant the seeking of writs of habeas corpus in the state courts.\(^3\) In general, state postconviction procedures allow petitioners to press claims that their convictions violated rights that are constitutionally protected at the state or the federal level. Ohio adopted such a procedure by statute\(^4\) only after the Supreme Court repeated its injunction to the states sixteen years later in *Case v. Nebraska*.\(^5\) Comity and federalism furnished the rationale for the creation of a procedure at the state level that was essentially parallel to the procedure for handling petitions for writs of habeas corpus at the federal level.\(^6\) Provided that the states could successfully create and administer their own systems of postconviction review, the federal courts would refrain from becoming involved in state criminal procedure.

From the time the Ohio Post-Conviction Remedy Act was adopted commentators recognized the significant problems that were to attend its administration.\(^7\) Although some initial difficulties arose in getting trial court judges to follow the statutory procedure,\(^8\) the most important problems at the state level centered on the scope and availability of postconviction review.\(^9\) As anticipated, those problems arose because the conviction was the product of a prior proceeding. Thus, it would have been possible initially for postconviction procedure to assume the character of de novo review or to be controlled

\(^{1}\) 337 U.S. 235 (1949).
\(^{2}\) Id. at 238-39.
\(^{3}\) For a useful discussion of state remedies, see L. YACKLE, POSTCONVICTION REMEDIES §§ 1–12 (1981). Professor Yackle classifies state remedies, whether statutory or by rule of court, on the basis of their resemblance to common-law remedies: remedies in the nature of habeas corpus, remedies in the nature of *coram nobis*, and remedies fitting neither description. Section 13 contains a survey of the postconviction remedies available in the various American jurisdictions. Id. § 13.
\(^{4}\) Ohio Post-Conviction Remedy Act, 131 Ohio Laws 684 (1965) (current version at OHIO REV. CODE ANN. §§ 2953.21–23 (Page 1982)).
\(^{5}\) 381 U.S. 336 (1965).
\(^{6}\) Id. at 344–46 (Brennan, J., concurring).
\(^{7}\) See generally Herman, Symposium on Post-Conviction Remedies: Foreword and Afterword, 27 OHIO ST. L.J. 237 (1966).
\(^{8}\) Id. at 241; see also Anderson, Post-Conviction Relief in Tennessee—Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act, 48 TENN. L. REV. 605, 613–15 (1981).
by traditional doctrines of finality. As this Comment will show, the latter is the development that emerged under the guidance of a line of Ohio Supreme Court decisions. On the federal level the hopes that comity and the integrity of federalism would be preserved by the new state procedure have been mostly disappointed. While a new trend may develop in the wake of recent United States Supreme Court decisions, until now the federal district courts in Ohio, in heeding decisions handed down by the Sixth Circuit Court of Appeals, have found it necessary to review claims of constitutional violations in Ohio criminal convictions. Under the guidance of the court of appeals a special body of law has developed that creates exceptions to the usual standards of availability of federal habeas corpus review for Ohio petitioners. The anomaly of an "Ohio exception" to prevailing federal-state relations on federal review of state criminal convictions flies in the face of what Ragen and Case and the Ohio legislative response to them had sought to achieve.

By restricting access to federal habeas corpus review on grounds of comity and federalism, decisions of the Supreme Court early in 1982 have undermined the viability of the "Ohio exception." Given the extremely limited availability and scope of state collateral review and the new barriers to federal review, Ohio petitioners find themselves in a predicament: more than ever, they are apt to find no forum willing to hear their constitutional claims, and their claims are vulnerable to procedural default. If Ohio petitioners are to be heard at all, current law seems to require that they make out a claim of ineffective assistance of counsel. Differing federal and state standards make federal courts the best forum for such a claim. Ironically, the need for recourse to the federal courts renders state postconviction review meaningless, a procedural form without a function. Moreover, the centrality of the constitutional issue of ineffective assistance shifts the focus of state criminal process to that aspect of it the defendant is least able to assess or manage—the knowledge and skill of the defense attorney. Recent developments in the law have neglected the need for a rational basis on which to determine when federal review of a state conviction is sufficiently compelling to override countervailing policy considerations.

The contents and background of the Ohio Post-Conviction Remedy Act will be reviewed briefly. Identification of the major threads in the Ohio Supreme Court's construction of the statute will lead to an analysis of the emergence of a special federal common law for Ohio petitioners, the "Ohio exception," and of the frustration of comity in postconviction review of Ohio criminal convictions. An explanation of recent developments at both the

10. See generally Herman, supra note 7, at 240.
11. See infra text accompanying notes 106-34.
13. See infra subpart II(B).
14. See infra part I.
15. See infra part II.
federal and state levels will elucidate the persisting difficulties in the interpretation and administration of the Ohio Post-Conviction Remedy Act and will introduce an analysis of the present state of the law.

I. THE OHIO POSTCONVICTION REMEDIES STATUTES AND THEIR ORIGINS

A. Substance of the Statutes

Enacted in 1965 and substantially revised in 1967, the Ohio postconviction remedies statutes set forth both the substance and procedure of postconviction review. The substantive portion of the principal statute, section 2953.21 of the Ohio Revised Code, provides that any person convicted of a criminal offense or found delinquent who claims that his rights were infringed in such a way "as to render the judgment void or voidable under the Ohio constitution or the Constitution of the United States" has the right to seek postconviction relief. The individual must file with the court that handed down the sentence a petition requesting that the judgment or sentence be vacated or set aside. In one of its broadest provisions, the statute states that the petition may be filed "at any time." Other appropriate relief may be requested. The grounds for relief must be stated, and a supporting affidavit or other documentary evidence may be filed with the petition. The apparent intent of the statute is to attach such importance to a convicted defendant's constitutional rights that a separate and distinct mechanism for collateral review, over and above direct appeal, is warranted. The statute seems to ask no more of the petitioner than a firm belief that his conviction was void or voidable, a plausible theory to support that belief, and the filing of the petition. The remaining provisions establish an elaborate procedure for consideration of the petition. The procedure for collateral review of criminal

16. See infra subparts II(C), (D); infra part III.
17. 131 Ohio Laws 684 (1965) (current version at OHIO REV. CODE ANN. §§ 2953.21–23 (Page 1982)).
18. Act of Sept. 8, 1967, 132 Ohio Laws 966 (1967-68). The impetus for amending came in part from difficulties that arose in administering the broad provisions of the statutes. For example, under the original act the petitioner had to be in custody under sentence, a requirement that created problems both for prisoners incarcerated under one sentence who were challenging a separate proceeding that resulted in a second sentence and for individuals on probation or parole. Comment, Operation of the Ohio Post-Conviction Remedy Act, 29 OHIO ST. L.J. 727, 728-29 (1968).
19. The author recognizes that the provisions of the statutes apply equally to women and men. The use of the grammatical masculine is not intended to denote the gender of any natural person.
21. Id.
22. Id.
23. Id. § 2953.21(B)-(H); § 2953.22; § 2953.23. Once docketed, the petition is to be promptly brought to the court's attention. The court must make a preliminary review of the petition to determine whether substantive grounds for relief exist. That review must take into account not only the petition and supporting documentation, but also all materials, including the trial record, relevant to the proceedings against the petitioner. If the court dismisses, it must make and file findings of fact and conclusions of law. Id. § 2953.21(C). The prosecuting attorney may respond by demurrer, answer, or motion within ten days of docketing. Within twenty days thereafter, either party may move for summary judgment, although the right to summary judgment must appear on the face of the record. Id. § 2953.21(D). Without leave, the petitioner may amend his petition at any time prior to the filing of the demurrer, answer, or motion, and thereafter at any time with the court's permission. Id. § 2953.21(F). Unless the petition was denied as a result of the court's preliminary review, the court is to hold a prompt hearing and to make and file written findings of fact and conclusions of law at the point that judgment is entered. Id. § 2953.21(E). If the court finds that grounds for granting relief exist, it is to vacate and set aside the
convictions in Ohio has not only spawned much litigation, but has also raised serious questions in the federal courts about the kind of substantive protections that Ohio collateral review actually affords.24

B. Legislative Background

1. Response to the Crisis in the State Courts

Prior to enactment of the postconviction remedies statutes, although other avenues of relief were theoretically available, collateral attack via habeas corpus proceedings was the usual route for review of alleged constitutional defects.25 Responding to an ever increasing number of habeas corpus petitions, the Ohio Supreme Court severely limited the scope and availability of the remedy. In a 1963 decision, Perry v. Maxwell,26 the court held that relief would be granted only when the trial court lacked traditional personal or subject matter jurisdiction. This holding contravened the standing federal rule that for purposes of postconviction review of federal convictions constitutional defects were jurisdictional defects.27 Two years later the court declared in dictum that the status of habeas corpus in Ohio was solely that of a pre-conviction remedy for illegal detention.28 Paradoxically, the court did make occasional, though inconsistent, exceptions to its own rule, notably when a petitioner proceeded at least in part on the issue of right to counsel.29

Despite the restrictive approach of the Ohio Supreme Court, the volume earlier judgment and, when appropriate, discharge or resentence an incarcerated individual, grant him a new trial, or stay execution of the death penalty. In addition, supplemental orders concerning reassignment, retrial, custody, and bail are permitted. Id. § 2953.21(G)-(H). Generally, the emphasis is on flexibility in fashioning remedies.

Two additional procedural matters are specified in separate sections of the Ohio Revised Code. First, if a hearing is granted, the petitioner may be present, and if he is incarcerated, the court has the authority to issue a warrant to make his presence possible. Testimony of the petitioner on his own behalf, and testimony of other witnesses, may be offered by deposition. Id. § 2953.22. Thus, the statute is designed to respect broad principles of due process. Second, whether or not the petition justifies a hearing, the trial court has the discretion to entertain successive petitions for relief. The award or denial of relief is an appealable final judgment. Id. § 2953.23. While the statute provides bars to repeated petitioning, it does allow the petitioner considerable latitude in making his request as well as recourse to appellate review of a denial.

As originally enacted, the statutes included § 2953.24, which provided for appointment of counsel. That section was repealed, effective in 1976, upon establishment of state and county public defender programs. Ohio Public Defender Act, 136 Ohio Laws 1868, 1895 (1975-76).

24. See infra subpart II(B).
25. See Herman, supra note 7, at 237-38.
29. See, e.g., Yarbrough v. Maxwell, 1 Ohio St. 2d 91, 204 N.E.2d 533 (1965); Madison v. Maxwell, 177 Ohio St. 84, 202 N.E.2d 617 (1964). By contrast, in Carter v. Maxwell, 177 Ohio St. 35, 201 N.E.2d 623 (1964) (per curiam), the court ruled on petitioner's contentions that his detention was illegal because he was convicted under a void indictment, that his sentence was void for vagueness, and that he had been improperly returned to prison for parole violation; however, his contention of incompetent counsel was ruled noncognizable in habeas corpus. Likewise, in Braxton v. Maxwell, 1 Ohio St. 2d 134, 205 N.E.2d 397 (1965) (per curiam), a pro se petitioner's allegations of defective indictment, denial of due process because of failure to try separately on separate counts, defective sentencing, and lack of counsel at the time of arrest were reviewed and found insufficient to justify postconviction relief. See Recent Development, The Availability of Habeas Corpus to Attack a Criminal Indictment After Conviction, 26 OHIO ST. L.J. 496, 505-06 (1965).
of habeas corpus petitions continued to grow, and the legislature enacted the Post-Conviction Remedy Act as an emergency measure because postconviction collateral review was deemed "the best method of protecting constitutional rights of individuals and, at the same time, providing a more orderly method of hearing such matters." The preclusive effect of the new remedy on most petitions for habeas corpus was confirmed when the Ohio Supreme Court held shortly after the new statutes went into effect that the availability of statutory postconviction remedies was grounds for denial of relief in both pending and future habeas corpus actions.

2. Federal-State Judicial Relations

The background of federal-state judicial relations at the time the Act was adopted throws into relief some of the ongoing problems with Ohio postconviction remedies. Case v. Nebraska, a landmark United States Supreme Court decision, dates from the same year as the enactment of the Ohio Post-Conviction Remedy Act. In Case the Court vacated and remanded a decision of the Nebraska Supreme Court that had affirmed the dismissal of a habeas corpus petition alleging unconstitutional denial of assistance of counsel. Although the Nebraska court had conceded that the petitioner's allegations, if true, would establish a violation of the federal constitution, it nevertheless adopted a position identical to that taken three months earlier by the Ohio Supreme Court. The Nebraska court stated: "Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." Although the United States Supreme Court had granted certiorari to consider the states' obligations under the fourteenth amendment to provide a meaningful remedial process for reviewing and deciding claims of violation of federal constitutional guarantees, the question was mooted by the Nebraska legislature's adoption of a postconviction procedure statute effective three days prior to oral argument. Justice Clark's concurrence noted that as early as 1949 in Young v. Ragen the Court had articulated the principle that the states were obligated to afford some clear means for prisoners to raise claims of denial of federal rights, but that Nebraska was only the thirteenth state to adopt such a procedure.

30. Herman, supra note 7, at 239.
31. 131 Ohio Laws 1611 (1965). This section of the act was not codified.
33. 177 Neb. 404, 410, 129 N.W.2d 107, 111 (1964).
34. Id. at 337. The Nebraska decision, Case v. State, appears at 177 Neb. 404, 129 N.W.2d 107 (1964).
35. 177 Neb. 404, 410, 129 N.W.2d 107, 111 (1964).
37. 177 Neb. 404, 412, 129 N.W.2d 107, 112 (1964).
38. Case v. Nebraska, 381 U.S. 336, 336-37 (1965). The text of the Nebraska statutes, which have not been amended since adoption, is found in NEB. REV. STAT. §§ 29-3001 to -3004 (1979).
Many of the initial difficulties in administering the Ohio statutes may have arisen because the law was almost a verbatim copy of the Nebraska statute, which was still very recent and hence devoid of decisional gloss. But the Ohio statutes did not reflect the judicial experience of other jurisdictions in accommodating the goal of a procedure designed to preserve all meritorious cases with the conflicting goal of a procedure capable of separating out frivolous petitions. As a result the interpretation of the statutes by the Ohio courts has produced a restrictive approach to postconviction review in the state courts and a counterbalancing expansive approach in the Sixth Circuit Court of Appeals.

II. JUDICIAL CONSTRUCTION

A. The State Courts

Early decisions of the Ohio Supreme Court centered on the statutory procedure for postconviction review and confirmed the need to adhere strictly to it. The court considered more substantive issues for the first time in 1967 in State v. Perry. Faced with four petitions for postconviction relief alleging constitutional defects in procedure at both the trial and appellate levels, the court held that the Ohio statutes did not contemplate a second opportunity to litigate claims in postconviction proceedings if no allegations were made that the claims could not have been fully adjudicated during the trial and subsequent appeal.

Although Perry raised some procedural questions similar to those in the earlier decisions, the scope of collateral review under the statutes was at the heart of the decision. The Perry court attempted to define the terms “void or voidable,” used in the statute to designate the basis for collateral attack. The court dealt only summarily with the term “void,” proclaiming that it goes to the jurisdictional foundation of the judgment of conviction:

Within the meaning of the statute, a judgment of conviction is void if rendered by a court having either no jurisdiction over the person of the defendant or no jurisdiction of the subject matter, i.e., jurisdiction to try the defendant for the crime for which he was convicted. Conversely, where a judgment of conviction is rendered

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42. Jones v. State, 8 Ohio St. 2d 21, 222 N.E.2d 313 (1966) (when the record does not contain sufficient facts, a court denying a petition must conduct a hearing to file the findings of fact and conclusions of law required by law); State ex rel. Turpin v. Court of Common Pleas, 8 Ohio St. 2d 1, 220 N.E.2d 670 (1966) (writ of mandamus can issue to compel a court of common pleas to rule on a petition pending for twelve months); accord State v. Lester, 41 Ohio St. 2d 51, 322 N.E.2d 656 (1975).
43. 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). Contra Laugesen v. State, 11 Ohio Misc. 10, 227 N.E.2d 663 (C.P. Cuyahoga County 1967) (decided one day before Perry). "Common sense would seem to dictate that postconviction remedies exist to try fundamental issues of constitutional guarantees that have not been tried before. Ordinary principles of finality of judgments must apply to all questions which have been completely litigated." Id. at 13, 227 N.E.2d at 666.
44. 10 Ohio St. 2d 175, 182, 226 N.E.2d 104, 109 (1967).
by a court having jurisdiction over the person of the defendant and jurisdiction of
the subject matter, such judgment is not void, and the cause of action merged
therein becomes *res judicata* as between the state and the defendant.\textsuperscript{45}

Thus, any question of voidness would be wholly preliminary, because logica-
ly prior, to all aspects of criminal trial procedure.

The term "voidable," however, proved less transparent. The court
reasoned that the operative distinction lay in the possibility that a judgment
that was not jurisdictionally defective could be set aside by appellate review.
On the basis of that distinction the court envisioned the possibility of ruling
that constitutional issues could be litigated in postconviction proceedings,
even though the issues had been or could have been fully litigated by the
petitioner at the original trial or on direct appeal, "and thus have been adjudic-
cated against him."\textsuperscript{46} The court concluded, however, that such an outcome
would be incompatible with the doctrine of res judicata.\textsuperscript{47} The court went on
to construe "voidable" to fit only those situations in which a petitioner could
not have raised an issue at trial or on direct appeal: specifically, discovery of
new facts, and lack of representation by counsel at the trial or in making a plea
of guilty that resulted in conviction.\textsuperscript{48} Having thus managed to stop short of
declaring the term "voidable" devoid of any functional meaning, the court
was able to enunciate a rule that was to be repeated unrelentingly in the Ohio
courts: under the doctrine of res judicata, a final judgment of conviction bars
the defendant from raising and litigating in any proceeding, except on direct
appeal, any defense or alleged lack of due process that was raised or could
have been raised at the trial resulting in conviction or on appeal from that
judgment.\textsuperscript{49}

The importance of *Perry* went well beyond its enunciation of the major
rule of Ohio postconviction procedure. First, in a curious line of reasoning,
the court justified its interpretation of "voidable" in *Perry* by recourse to the
history of the common law rather than to the legislative intent. The court
speculated that the common-law writs of *coram nobis* and *coram vobis*\textsuperscript{50}
might have permitted assertion of claims that it deemed cognizable under the
"voidable" judgment theory of postconviction review.\textsuperscript{51} The writ of *coram
nobis* was used to review, correct, or vacate a judgment when no other
remedy was available. The scope of review was limited to errors of fact that
were extrinsic to the record, affected the validity of the proceedings, were not

\textsuperscript{45} *Id.* at 178-79, 226 N.E.2d at 107.
\textsuperscript{46} *Id.* at 179, 226 N.E.2d at 107.
\textsuperscript{47} *Id.*
\textsuperscript{48} *Id.* at 179-80, 226 N.E.2d at 107-08.
\textsuperscript{49} *Id.*
\textsuperscript{50} The distinction between the two writs never had any practical importance and represented no more
than a formal distinction based on the court in which the proceedings were held. See 18 AM. JUR. 2D *Coram
Nobis and Allied Statutory Remedies* § 1 (1965).
\textsuperscript{51} 10 Ohio St. 2d 175, 180, 226 N.E.2d 104, 108 (1967).
put in issue at trial, were unknown at the time of the trial through no fault of
the petitioner, or were unknown to the trial court but would have prevented
rendition of judgment if known. Because of the evidentiary orientation of
review under the writs, it is difficult to see how they provide any conceptual
basis for postconviction review of claims based on lack of counsel. Moreover,
the court ruled that because an earlier Ohio Supreme Court decision had
held that the two writs were not part of Ohio criminal jurisprudence, only
habeas corpus relief had been available prior to the 1965 enactment. The
court’s discussion reduces to a justification of its broad application of res
judicata in arriving at the Perry rule. While the court cited authority to the
effect that relief under a writ of coram nobis is barred when the petitioner, at
the time of trial, knew of the factual error, or would have but for his lack of
diligence, that tack only confuses waiver with res judicata and obscures the
real questions of statutory interpretation.

As was recognized early in the history of the Post-Conviction Remedy Act, when the Perry court chose finality of judgment over the countervailing
policy of full and fair adjudication, postconviction review in Ohio was severely
restricted, in total disregard of the legislative intent behind it. This result
was facilitated by the court’s assimilation of the ambivalent concept of waiver
into the doctrine of res judicata.

In its Standards Relating to Post-Conviction Remedies the American
Bar Association distinguishes between waiver as a rule of finality of judg-
ment, that is, issues not presented at a specified time or in a specified way are
said to have been waived, and the principle that a party to a criminal action
can, with binding effect, make a knowing and informed choice to forego
certain rights. The former is procedural, while the latter is a corollary of the
law creating the right. The significance of the distinction comes into sharp
focus when a federal constitutional right is considered in a state postconvic-
tion proceeding: what constitutes a waiver in the sense of a voluntary relinqu-
ishment is a question of federal constitutional law, while the scope of a
prior judgment is a question of state procedural law.

If the state court denies relief on the grounds that the applicant intelligently and
understandingly waived the right in question, it has rendered a decision on a
question of federal constitutional law. On the other hand, if the state court denies

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52. 18 AM. JUR. 2D Coram Nobis and Allied Statutory Remedies § 3 (1965).
53. State v. Hayslip, 90 Ohio St. 199, 107 N.E. 335 (1914).
54. Id.
55. 10 Ohio St. 2d 175, 180, 226 N.E.2d 104, 108 (1967).
56. Id. at 180-81, 226 N.E.2d at 108 (citing 18 AM. JUR. 2D Coram Nobis and Allied Statutory Remedies
§ 33 (1965)).
58. Id. at 733.
59. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO POST-CONVICTION REMEDIES (AP-
proved Draft 1968).
60. Id. § 6.1 commentary at 88-89.
relief on the ground that the applicant should have raised the question at some earlier proceeding, it has rendered a decision on a question purely of state law. Where it is found that an applicant has relinquished a right, the decision is tantamount to holding that the right was never violated. The decision, thus, is directly on the merits. Where the foreclosure by judgment rule is applied, the court refuses to reach the merits of the asserted denial of the constitutional right.\(^6^1\)

In sum, the distinction entails important implications concerning federalism and adjudication on the merits.

Strictly speaking, res judicata denotes two concepts regarding a valid final judgment: the preclusion of claims (merger and bar), preventing relitigation between the parties of all matters that figured in the same cause of action regardless of whether they were actually litigated; and the preclusion of issues (collateral estoppel), giving binding effect in a subsequent action to issues litigated and decided in a previous case involving the party to be estopped, provided that that party had the opportunity and the incentive to litigate the issue.\(^6^2\) Intentional waiver turns on the facts of each individual situation, while res judicata represents a sweeping judicial doctrine designed to promote finality of judgment, to which exceptions are recognized when an overriding social policy is present and when manifest injustice would result from strict application.\(^6^3\) While res judicata imposes both finality on litigated claims and forfeiture of rights on unlitigated claims, the legislative history of the Ohio postconviction collateral review statutes indicates that the stakes in criminal prosecutions are sufficient to warrant a second opportunity to litigate a previously unlitigated substantive claim.\(^6^4\)

The Supreme Court has said that the unique purpose of collateral review through habeas corpus proceedings has been to create an exception to the doctrine of res judicata.\(^6^5\) Any other application of the principles of finality of judgment creates an almost insuperable presumption that the criminal defendant fully understood what transpired at the trial and made a rational choice not to raise constitutional defenses, if any existed. Under Ohio procedure it should be possible for a trial court reviewing a postconviction petition to determine accurately what the defendant understood and chose to do or not to do; thus from the standpoint of procedure alone the \textit{Perry} rule may be unnecessary. Stated more abstractly, the expansive interpretation of res judicata in \textit{Perry} obliterates the distinct concept of intentional waiver by failing to acknowledge that res judicata, a common-law doctrine of judicial administration, is necessarily subordinate within the legal system to concepts, such as

\(^{61}\) Id. at 89.
\(^{62}\) See generally 1B \textit{Moore's Federal Practice} \(\S\) 0.405–448 (2d ed. 1982); \textit{Restatement (Second) of Judgments} \(\S\) 13, 17–20, 26–28 (1982).
\(^{63}\) 1B \textit{Moore's Federal Practice} \(\S\) 0.405(11) (2d ed. 1982).
\(^{64}\) See supra text accompanying note 31.
waiver, that indicate an individual's status under constitutional and statutory law. The thrust of the Perry rule is the refusal of the Ohio Supreme Court to have the Ohio courts shoulder the burden of Young v. Ragen, but the reasoning used to justify that intransigence is conceptually confused.

A second major aspect of Perry's importance derived from the immediate federal response to the decision, the beginning of ongoing tension between the federal and Ohio courts over the availability of state postconviction relief. In Coley v. Alvis66 the Sixth Circuit Court of Appeals reversed the denial of a petition for habeas corpus. Although relief had been denied because Coley had failed to exhaust state remedies,67 the narrow construction given the Ohio postconviction statutes in Perry, handed down while Coley's appeal of the denial of his petition was pending, led the Sixth Circuit to find that there was "no longer any effective remedy open to the Appellant to exhaust" and that Perry had "rendered such process ineffective to protect the rights of Appellant."68 Subsequent to Coley the Ohio Supreme Court modified its Perry stance by permitting collateral review of an allegedly involuntary plea of guilty under the postconviction remedies statutes.69

B. Federal Decisions and the Emergence of the Futility Exception

Although the federal courts in Ohio had initially perceived the new state postconviction review as distinct from, and much broader in scope than, the former state habeas corpus review,70 that perception gave way to the Coley court's more realistic recognition that federal habeas corpus review had to remain a mainstay of judicial review if the constitutional rights of individuals convicted under Ohio criminal law were to be protected.71 Indeed, a line of federal decisions attempted to articulate the exact relationship between state postconviction review and federal review and to identify any operative exceptions to the Perry rule.72 Among the most important of these is Terrell v. Perini.73 In Terrell the district court had dismissed a petition on the ground of

66. 381 F.2d 870 (6th Cir. 1967).
67. Id. at 871. The federal habeas corpus statute predicates the granting of the writ on a showing that the petitioner "has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b) (1976).
68. 381 F.2d 870, 872 (6th Cir. 1967).
69. State v. Milanovich, 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975). The limited holding of this decision was no more than a variant of the existing ineffective assistance of counsel exception to the application of res judicata in postconviction proceedings. See infra note 76 and accompanying text.
70. Olney v. Green, 247 F. Supp. 368 (N.D. Ohio 1965). The ensuing discussion identifies trends in the Sixth Circuit's handling of petitions from Ohio petitioners. Much of the Sixth Circuit's approach is inconsistent with the thrust of Wainwright v. Sykes, 433 U.S. 72 (1977), which will be discussed later. See infra note 101; see also infra text accompanying notes 96–105.
71. See supra text accompanying note 68.
73. 414 F.2d 1231 (6th Cir. 1969).
failure to exhaust state remedies. The constitutional violations allegedly vitiating the petitioner’s conviction included coerced confession, defective indictment, and incompetent counsel.\footnote{Id. at 1232–33.} The Sixth Circuit Court of Appeals ruled that because the trial court had both personal and subject matter jurisdiction and because the questions raised, other than competence of counsel, could have been adjudicated at trial, the judgment of conviction was neither void nor voidable under the rule of \textit{Perry}. However, since the petitioner could not have known of the alleged incompetence of his counsel until after the trial and since the issues of coerced confession and defective indictment were not cognizable under the \textit{Perry} analysis, the petitioner was entitled to proceed in federal court because he had exhausted state remedies on those claims.\footnote{Id. at 1233.} The Ohio Supreme Court subsequently responded by recognizing an exception to the \textit{Perry} rule on the isolated issue of ineffective assistance of counsel.\footnote{State v. Hester, 45 Ohio St. 2d 71, 341 N.E.2d 304 (1976) (when the record does not disclose that the issue of counsel’s competence had been adjudicated, res judicata does not apply); State v. Juliano, 24 Ohio St. 2d 117, 265 N.E.2d 290 (1970) (per curiam); City of Dayton v. Hill, 21 Ohio St. 2d 125, 256 N.E.2d 194 (1970) (the court stated without explanation that alleged denial of adequate counsel eliminated the question of res judicata decided in \textit{Perry}); accord Burrows v. Engle, 545 F.2d 552 (6th Cir. 1976); Esherick v. Perini, 475 F.2d 577 (6th Cir. 1973); see Steed v. Salisbury, 459 F.2d 475 (6th Cir. 1972) (because ineffective assistance of counsel is cognizable under the Ohio Post-Conviction Remedy Act, habeas corpus will not lie in federal court until the state remedy is exhausted).}

A second exception to the exhaustion requirement emerged in \textit{Mackey v. Koloski}.\footnote{413 F.2d 1019 (6th Cir. 1969).} The issue was whether a petitioner, appealing denial of his federal habeas petition, should be required to seek a delayed appeal of the denial of his motion to vacate his sentence in order to exhaust state remedies prior to seeking federal relief. Again, the restrictive \textit{Perry} rule was held to warrant opening the doors of the federal courts to Ohio petitioners.\footnote{Id. at 1021.}

The following year, in a well-reasoned decision, \textit{Allen v. Perini},\footnote{424 F.2d 134 (6th Cir.), cert. denied, 400 U.S. 906 (1970), denial of petition on remand aff’d, 458 F.2d 233 (6th Cir. 1972).} the Sixth Circuit took up yet another variation on what constituted exhaustion of state remedies for Ohio petitioners in federal court. Allen failed, on the authority of the \textit{Perry} decision, to appeal the dismissal of his petition for postconviction relief. He had been convicted on a plea of guilty and had resorted to postconviction remedies to press his claim that the plea was coerced and, therefore, violated his constitutional rights.\footnote{Id. at 139–40.} To the State’s argument that the postconviction relief available to the petitioner was broader...
than indicated in Perry, the Allen court responded with a combination of general policy reflections and judicial prodding:

This Court would prefer strongly to agree with . . . the State on this point. It would be highly desirable for Ohio prisoners to have all the relief available in the state courts of Ohio that is available by federal habeas corpus. The judges of this Court as well as the United States District Judges of Ohio would prefer that these issues be determined by State courts . . . .

Thus, a clear conflict between the state and federal courts in Ohio over responsibility for constitutional safeguards in the criminal process had emerged.

Part of the importance of the decision lay in the court’s affirmance of the Coley principle: in the words of the Allen court, an appeal from dismissal of a petition for postconviction relief on the ground of coerced inculpatory statements would have been “futile under the decision of the Ohio Supreme Court in State v. Perry.” 82 From this premise the court concluded that in the absence of any Ohio decision modifying the Perry rule, the exhaustion requirement did not oblige a petitioner proceeding on grounds such as Allen’s to appeal from the state court dismissal prior to seeking relief in federal court. 83 The Allen decision brought together the individual exceptions to the exhaustion requirement, which had been identified in earlier decisions under the general designation “futility exception,” 84 and thereby acquired abiding significance. The pointed language of the Allen court suggests two conclusions. First, the federal courts were doubtless aware of the Ohio Supreme Court’s strategy of displacing postconviction litigation from the state courts and were impatient with the State’s continued claim of nonexhaustion in response to federal petitions when exhaustion entailed only futile state court proceedings. Second, a logical extension of the futility doctrine as propounded by the Allen court would have exempted petitioners from making any effort to seek relief in the state courts, even at the trial court level.

More recently, the Sixth Circuit recapitulated and synthesized the pertinent federal decisional law in what has become the leading case on the “Ohio exception,” Keener v. Ridenour. 85 The importance of this decision lay, first, in its clear articulation of the relationship between state and federal collateral proceedings, and second, in its identification of the test for bypass-

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81. Id. at 139 (citing Townsend v. Sain, 372 U.S. 293 (1963)); see also Keener v. Ridenour, 594 F.2d 581, 591 (6th Cir. 1979).
83. Id. at 139–40.
84. Id. at 139. The futility exception has played an important role in lower federal court decisions. See, e.g., Collins v. Perini, 448 F. Supp. 1006 (N.D. Ohio 1978); Brenson v. Havener, 403 F. Supp. 221 (N.D. Ohio 1975); see also Matthews v. Wingo, 474 F.2d 1266 (6th Cir.), cert. denied, 411 U.S. 985 (1973) (Kentucky petitioner not required to file in state court a second motion to vacate judgment on new grounds). It is important to remember that despite the exceptions to the exhaustion requirement that have been established for Ohio prisoners, the requirement remains in force in many situations; see, e.g., King v. Perini, 431 F. Supp. 481 (N.D. Ohio 1976).
85. 594 F.2d 581 (6th Cir. 1979), dismissal on remand aff’d, 640 F.2d 839 (6th Cir. 1981).
ing the exhaustion requirement. The court’s discussion of the exhaustion requirement began with its citation of the American Bar Association’s declaration that the purpose of postconviction collateral action is to allow “review of fundamental issues not considered in prior proceedings.”86 Contrasting with the restrictive holding in Perry the Supreme Court’s holding in Fay v. Noia87 that the federal courts have the power to grant habeas relief to petitioners whose federal claims would not be directly reviewable by the Supreme Court because of adequate and independent state grounds for the decision,88 the court concluded that Ohio postconviction collateral relief is not coextensive with federal habeas corpus relief. Hence, short of amendment of the Ohio statute, constitutional claims that have not been reviewed by the courts of Ohio remain cognizable in federal court.89 An implicit test for determining whether a petitioner’s recourse to the federal courts overcame the hurdle of the exhaustion rule emerged in the ensuing discussion. When collateral relief is unavailable or ineffective as a state remedy, exhaustion is not required before resort to the federal courts.90 Recent decisions of the federal district courts in Ohio indicate that the Keener standard continues as the operative rule for Ohio prisoners’ petitions for writs of habeas corpus.91

The Keener court’s broad language had the effect of opening wide the doors of the federal courts to Ohio petitioners, at least until recent United States Supreme Court decisions revamped the common law in the field. Given the court’s position on the purposes of postconviction collateral action,92 in the Sixth Circuit federal habeas review afforded an opportunity for review of issues that are fundamental in nature, regardless of whether they have been raised at any stage prior to the filing of the federal habeas petition. However, the difficult problem of distinguishing fundamental issues from those that are not remains.

The Keener court dealt with the specific issues raised by the petitioner by articulating a test for what is cognizable under the Ohio statute. Because petitioner’s constitutional claim, based on double jeopardy, could have been fully litigated at trial or on direct appeal, it was held not cognizable under the Ohio Post-Conviction Remedy Act as construed by Perry. Therefore, peti-

86. Id. at 589 (relying on AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1 commentary at 86 (Approved Draft 1968)).
89. 594 F.2d 581, 589-90 (6th Cir. 1979).
90. Id. at 590.
92. See supra note 86 and accompanying text.
tioner had exhausted available state remedies on that claim and was properly in federal court. Petitioner's second claim, however, alleged that, because of a defect in bind-over procedure, the trial court had never obtained jurisdiction over him. On the basis of its allegation that the judgment of conviction was void, the second claim, which did not turn on a federal constitutional question, was found cognizable under state law, not federal law. Thus, having failed to exhaust all avenues of appeal to the state courts, petitioner was not properly in federal court on the second claim. The cognizable issue test effectuates a policy of making available effective review of any genuine constitutional issue. Provided that they are based on the federal constitution, claims that are doomed to failure under Ohio decisional law present valid federal questions, and those that Ohio courts will review do not. Such a system has much to recommend it from the standpoint of procedural efficiency, but it perpetuates federal responsibility for assuring protection of constitutional rights within state criminal procedure.

C. Closing the Doors of the Federal Courts After Wainwright v. Sykes

The Keener court's willingness to keep the doors of the federal courts open contrasts sharply with the general trend toward restricting the availability of federal habeas corpus review of state criminal convictions in the wake of the Supreme Court's decision in Wainwright v. Sykes. Sykes, criticized for being deficient in clear reasoning, apparently resuscitated the adequate state ground doctrine in federal habeas corpus review. Broadly, according to that jurisdictional doctrine the Supreme Court will not directly review a state court decision that rests on an independent and adequate state ground. Thus, while the Supreme Court will review the federal questions in a state case that do not rest on such a state ground, it generally will not review a state court's interpretation of its own law. It follows that a state conviction will not stand up when federal rights have been violated, but federal court review of the federal issues is blocked when the defendant has failed to comply with the requirements of state procedure. In Sykes the majority held that noncompliance with state procedure barred relief, unless the petitioner could show both cause for, and resultant prejudice from, such a waiver.

93. 594 F.2d 581, 590 (6th Cir. 1979). However, under the cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72 (1977), consideration of this claim seems to have been precluded. See infra text accompanying notes 96–103; see also Comment, Habeas Corpus: The Sixth Circuit Interprets the Cause and Prejudice Test of Wainwright v. Sykes, 48 U. CIN. L. REV. 862 (1979).
94. 594 F.2d 581, 591 (6th Cir. 1979).
95. See supra text accompanying notes 33–40.
99. Id.
The Sykes opinion does not explain the relationship between the cause and prejudice test and the adequate state ground doctrine in a way that gives clear guidance to the lower federal courts. Comment on Sykes, pointing to this imprecision, has suggested that the cause and prejudice standard may have paradoxically resulted in broadening the availability of habeas corpus review rather than in narrowing it as the majority intended. This broadening effect derived from the ambiguity of the cause and prejudice standard, which tended to expand the discretion of the federal courts in granting relief after a procedural default. And indeed, after Sykes the federal courts in Ohio have set the threshold of compliance with state procedure relatively low for Ohio habeas corpus petitioners.

More revealing in the present context is the Keener court’s handling of the potential obstacle of the Sykes holding. "The rules permitting federal habeas relief are not absolute. If the State can show that a prisoner ‘deliberately bypassed’ State remedies or is precluded from raising his claim through, [sic] ‘inexcusable procedural default’ of a State rule or provision, federal habeas corpus relief is precluded." Thus, the Sixth Circuit has handled the Sykes cause and prejudice test in a manner that creates a strong presumption in favor of the petitioner. Only when he has blatantly disregarded the availability of state relief is a petitioner to be denied access to the federal courts. In effect, the Keener court disregarded any modification that Sykes may have made in the availability of federal habeas corpus review and assimilated the cause and prejudice standard into the established deliberate bypass standard of Fay v. Noia, thereby preserving Noia’s broad construction of federal habeas corpus jurisdiction. But the court did not consider the reason for Keener’s failure to raise the postconviction issue on direct appeal. It is therefore reasonable to conclude that the issues raised in the habeas corpus petition were of the kind the court regarded as “fundamental”; that is, issues warranting the kind of constitutional protection that the Sixth Circuit has fostered for Ohio petitioners.

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103. 594 F.2d 581, 585 (6th Cir. 1979) (citations omitted).


105. 594 F.2d 581, 589 (6th Cir. 1979).
D. The October 1981 Term of the United States Supreme Court

Until recently, a clear inconsistency existed between the state and the federal courts' handling of petitions for collateral relief under the Ohio Post-Conviction Remedy Act. Generally, as long as petitioners fell within the futility exception or raised fundamental issues, their petitions were assured of review on the merits in the federal courts. The October 1981 term of the United States Supreme Court, however, produced decisions that cast serious doubt on the future availability of federal postconviction review for Ohio prisoners. In Rose v. Lundy, a deeply divided court, considering the impact of the exhaustion requirement on "mixed petitions" for habeas corpus brought in federal court, held that such petitions must be dismissed, leaving the petitioner with the option of returning to state court and meeting the exhaustion requirement or amending the habeas petition to save only the exhausted claims. Although recognizing the question of exhaustion of state remedies, the district court had granted the petition on the ground that the defendant had not received a fair trial because of prosecutorial misconduct. The Sixth Circuit Court of Appeals affirmed, concluding that the petitioner's constitutional rights had been seriously impaired. Justified broadly by comity and the absence of any unreasonable impairment of the petitioner's rights, the Court's decision did not explore what might constitute exhaustion. In dictum responding to the argument that the Court's holding would foster complication and delay in the disposition of habeas petitions, however, the majority made it clear that exhaustion results only from court proceedings: "[O]ur interpretation of [the federal habeas corpus statute] provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court."

In a particularly cogent dissent Justice Stevens, arguing for restricting the availability of federal habeas corpus review, adopted a line of reasoning that is compatible with the fundamental issues doctrine identified in Sixth Circuit opinions. After asserting that claims of constitutional error are not fungible, Justice Stevens proposed a four-part classification of such claims: (1) claims that attach a constitutional label to facts that disclose no violation of a constitutional right; (2) those that are not sufficiently important in the context of the particular case to justify reversal even on direct appeal; (3) those that, while

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106. Three major cases dealing with the availability of federal habeas corpus review were decided within a few weeks of each other: Rose v. Lundy, 455 U.S. 509 (1982); Engle v. Isaac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982). The Frady decision, which centers on the "plain error" standard, is not directly relevant to the present discussion.


108. Id. at 510. At 513 n.5 the Court noted that only the Fifth and Ninth Circuits had adopted the "total exhaustion" rule, while the majority of the courts of appeals, including the Sixth Circuit, had not. The Court cited as the leading Sixth Circuit case Meeks v. Jago, 548 F.2d 134 (6th Cir. 1976), cert. denied, 434 U.S. 844 (1977).


110. Id. at 550 (Stevens, J., dissenting).

111. 455 U.S. 509, 520 (1982).
justifying reversal on direct appeal, do not reveal the kind of fundamental unfairness that will support a collateral attack on a final judgment; and (4) those that are so fundamental that they infect the validity of the original judgment or the integrity of the process that led to it.\textsuperscript{112} Though subject to changing societal values, only the fundamental fairness at issue in the fourth type of claim would justify collateral relief.\textsuperscript{113} Referring specifically to the cause and prejudice standard and to the \textit{Lundy} total exhaustion rule, Justice Stevens' dissenting opinion went on to condemn needless judicial lawmaking and in particular the symbiotic relationship between the flood of habeas litigation and the Court's willingness to indulge in creating special procedural rules. Justice Stevens concluded that "[t]he availability of habeas corpus relief should depend primarily on the character of the alleged constitutional violation and not on the procedural history underlying the claim."\textsuperscript{114} This conclusion provides a rational basis for selective review in the federal courts of state convictions. In effect, Justice Stevens has proposed a workable position between the \textit{Noia} rule's marked broadening of federal habeas corpus jurisdiction and the retrenchment of the federal courts' discretion effected by the recent Supreme Court decisions. This same willingness to place substance before procedure has formed the basis of many of the Sixth Circuit's dispositions of Ohio prisoners' petitions.

A month later the Supreme Court handed down another decision, \textit{Engle v. Isaac},\textsuperscript{115} that further limited the scope of federal habeas corpus review. This time the case consolidated the separate cases of three Ohio petitioners whose denial of relief in the district court had been reversed by the Sixth Circuit.\textsuperscript{116} The Court's opinion, in upholding the validity of the \textit{Sykes} cause and prejudice standard, has far-reaching implications, potentially greater than those of \textit{Lundy}. While much of the \textit{Isaac} opinion concerns the allocation of burden of proof under Ohio law when the defendant raises self-defense, some aspects of Isaac's petition itself have special relevance to the present discussion. The precise order of events is crucial. In a trial that resulted in his conviction for aggravated assault, Isaac had raised the defense of self-defense and had not objected when the jury was instructed that he carried the burden of proving this defense by a preponderance of the evidence.\textsuperscript{117} On direct appeal to the court of appeals, Isaac relied on the intervening decision of the Ohio Supreme Court in \textit{State v. Robinson}\textsuperscript{118} to challenge the burden-of-proof instructions.\textsuperscript{119} In \textit{Robinson} the court had held that under recently changed

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 543-44 (Stevens, J., dissenting).
\item \textsuperscript{113} \textit{Id.} The examples Justice Stevens cites make clear that fundamental unfairness results from only the most egregious miscarriages of justice.
\item \textsuperscript{114} \textit{Id.} at 547-48.
\item \textsuperscript{115} 456 U.S. 107, \textit{reh'g denied}, 102 S. Ct. 2286, 102 S. Ct. 2976 (1982).
\item \textsuperscript{116} \textit{Id.} at 116-19 (1982) (citing \textit{Isaac} v. \textit{Engle}, 457 F.2d 1129 (6th Cir. 1980); Hughes v. \textit{Engle}, 642 F.2d 451 (6th Cir. 1980); \textit{Bell} v. \textit{Perini}, 635 F.2d 575 (6th Cir. 1980)).
\item \textsuperscript{117} 456 U.S. 107, 114-15 (1982).
\item \textsuperscript{118} 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976).
\item \textsuperscript{119} 456 U.S. 107, 115 (1982).
\end{itemize}
Ohio law the defense of self-defense placed on the defendant only the burden of going forward and not the burden of establishing the defense by a preponderance of the evidence. But the court of appeals rejected the challenge on the basis of the Ohio contemporaneous-objection rule and found that Isaac's claim had been waived by default. The Ohio Supreme Court dismissed Isaac's appeal on the same day it ruled that the retroactive application of the Robinson rule did not apply to defendants who had failed to make contemporaneous objections. The district court subsequently denied Isaac's petition for habeas corpus relief on the ground of waiver and failure to show cause or prejudice under the Sykes standard. Finding that the Ohio courts had denied Isaac due process, the Sixth Circuit Court of Appeals reversed. On rehearing, a majority of a panel of judges ruled that Isaac's petition satisfied the Sykes cause and prejudice standard, determining that he had had no reason to object to the instruction since before the promulgation of the Robinson rule such an objection would have been futile, and that prejudice resulted because burden of proof is crucial to the fact-finding process in criminal procedure.

In the Supreme Court opinion the majority began by finding that of Isaac's two constitutional claims only one, the allegation that Ohio could not constitutionally shift the burden of proving self-defense to him, was colorable. That threshold inquiry completed, the next question was whether he had preserved his claim before the state courts, and, if not, whether the Sykes standard barred consideration of the claim in federal court. Unwilling to decide whether Isaac, tried prior to the enunciation of the Robinson rule, could have reasonably been expected to make a contemporaneous objection, the majority first concluded that Isaac had forfeited his constitutional claim and then launched into a broad discussion of judicial policy, which characterized habeas corpus proceedings as costly. Collateral review "extends the ordeal of trial for both society and the accused"; liberal granting of relief "degrades the prominence of the trial itself," often costing society the right to punish admitted offenders; and special costs to the federal system result from "[f]ederal intrusions into state criminal trials [that] frustrate both the States' sovereign power to punish offenders and their good faith attempts to honor constitutional rights." With those principles of judicial economy
in place, the majority was able to dispose of all three petitioners’ contentions in short order. Petitioners had argued futility, claiming that objection to the trial court’s instructions on self-defense would have been unavailing given Ohio’s long-established common law on the subject. In language seemingly calculated to undercut the Sixth Circuit’s development of the futility exception,\textsuperscript{128} the majority declared that for reasons of comity and finality of judgment futility cannot constitute cause for a failure to object at trial:

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid.\textsuperscript{129}

Lest the less tactically minded or less optimistic petitioner should think his failure to object justifiable on the basis of excusable neglect, the majority went on to state that the subsequent discovery of a constitutional defect unknown at the time of trial “does not invariably render the original trial fundamentally unfair.”\textsuperscript{130} The net effect of Isaac is to place a very considerable burden on the federal habeas petitioner to make a showing of cause and prejudice under Sykes. Apparently, a large measure of both is henceforth the key to unlocking the doors of the federal courts.\textsuperscript{131}

In a pointed dissent Justice Brennan, noting the application of res judicata to limit the availability of postconviction relief in Ohio, concluded that because Isaac’s claim was, as a practical matter, one that could not have been raised at trial or on appeal, the federal court should have sent him back to the state courts to pursue state postconviction relief on his unexhausted claim.\textsuperscript{132} The dissent concluded by refuting the majority’s misconstruction of Sykes. For Justice Brennan the Isaac decision, characterized by “unvarnished hostility to the assertion of federal constitutional claims,”\textsuperscript{133} overextended the Sykes standard and broke the promise in the latter decision that that standard would not prevent a federal court from adjudicating for the first time the federal constitutional claim of a habeas petitioner who, in the absence of such an adjudication, would be the victim of a miscarriage of justice.\textsuperscript{134} Here again, conceptually the argument is very close to Justice Stevens’ distinction of the character of the claim from its procedural history.

While the ultimate impact of Isaac and Lundy on Sixth Circuit decisions remains to be worked out, early indications are that the existing federal-state conflict over postconviction relief in Ohio has not abated. In May 1982 the

\textsuperscript{128} See supra subpart II(B).
\textsuperscript{129} 456 U.S. 107, 130 (1982).
\textsuperscript{130} Id. at 131.
\textsuperscript{131} The majority noted that the two criteria in Sykes are stated in the conjunctive. Id. at 134 n.43.
\textsuperscript{132} Id. at 139–41 (Brennan, J., dissenting).
\textsuperscript{133} Id. at 148.
\textsuperscript{134} Id. (relying on the express language of Wainwright v. Sykes, 433 U.S. 72, 91 (1977)).
District Court for the Northern District of Ohio decided _Floyd v. Marshall_.

The court squarely confronted the question of what remained of the Keener principle after the _Lundy_ total exhaustion rule. Having pursued direct appeal in the state courts and having been denied habeas corpus relief in federal court once, petitioner Floyd apparently filed again in another district. Respondent moved to dismiss on the mixed petition ground underlying the _Lundy_ rule.

Reasoning that the _Lundy_ court could not have intended any result that would clearly conflict with the federal habeas corpus statute, the court, prior to considering the petition on the merits, engaged in a close reading of the statutory exhaustion requirement, focusing on the provision that a petitioner "shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the rights under the law of the State to raise, by any available procedure, the question presented." Invoking the Keener principle, the court concluded that the statute requires exhaustion of state remedies "actually available . . . prior to consideration of the issues in a habeas corpus action." With that jurisdictional basis established, the court went on to consider whether petitioner's unexhausted claim, one that was not specifically jurisdictional in nature, was reviewable by the Ohio courts. Finding that no Ohio forum was available to petitioner, the court held that although the instant petition might be mixed it was proper for the court to review it. Curiously, the court justified its position by relying on some of the Supreme Court's precedential bases for the _Lundy_ opinion, bases that it turned back against the _Lundy_ opinion itself. In developing the argument in favor of the exhaustion doctrine on the basis of comity, the _Lundy_ court relied on _Ex parte Hawk_, noting Hawk's statement that the exhaustion doctrine does not bar relief "where the state remedies are inadequate or fail to 'afford a full and fair adjudication of the federal contentions raised.'" The _Lundy_ plurality also relied on _Galtieri v. Wainwright_, a Fifth Circuit decision adopting the total exhaustion rule. But the _Floyd_ court stressed that the _Galtieri_ opinion recognizes a significant exception: when the goals of the exhaustion doctrine would not be furthered, or when an overriding federal concern would be frustrated, no attempt to exhaust the state remedies need be made. The _Floyd_ court was thereby able, albeit in a roundabout fashion, to harmonize _Lundy_ with the prevailing decisional law in the Sixth Circuit embodied in _Keener_.

Thus, in the present state of the law, as interpreted by the federal courts,
the Ohio petitioner finds himself in a curious predicament. State postconviction relief is available to him only to a very limited extent. Unless his claim falls within one of the specific exceptions enumerated by the Ohio Supreme Court in the line of decisions following Perry, it is doomed to dismissal. Because of the broad construction the Sixth Circuit has given to the Sykes cause and prejudice standard, he had some hope of relief in the federal courts provided that he was able to make out a plausible claim that his constitutional rights, or some less well defined fundamental right, had been violated. The Sixth Circuit demonstrated a willingness to look beyond the narrow procedural history of the petitioner's criminal conviction and appeal and to weigh the possibility that he had been the victim of fundamental unfairness or that, as a practical matter, the common law of Ohio postconviction review precluded any meaningful review of his conviction. But Floyd notwithstanding, the 1982 decisions of the United States Supreme Court do not bode well for Ohio petitioners. Isaac has raised the Sykes standard to such a level that it has become a formidable hurdle.

While the irony of Justice Brennan's dissent in Isaac may have been intended to castigate the majority for a line of reasoning whose predicates consist entirely of a priori policy justifications, an "analysis [that] is completely result-oriented," still more subtle ironies lie at the heart of the Ohio petitioner's predicament. Justice Brennan would have reversed Isaac's petition and remanded with instructions to dismiss. Because Isaac's claim was "manifestly of the sort that could not have been raised at trial or on appeal," Justice Brennan maintained that state postconviction remedies had not been exhausted within the meaning of the federal habeas corpus statute. Isaac's direct appeal to the court of appeals had not succeeded because the court found that his failure to object to the jury instruction at his trial constituted a waiver, even though under existing Ohio decisional law objection would have been speculative, if not illogical. Concededly, Isaac did not pursue postconviction relief in the Ohio courts. Because of the institutionalization of the Perry res judicata doctrine and because his constitutional claim could have been raised at trial, if only theoretically, it is not surprising that the petitioner proceeded directly to federal court.

A further irony appears in the majority's allusion to the possibility that Isaac could have raised the issue of ineffective assistance of counsel. Noting that after In re Winship numerous courts had agreed that due process requires the prosecution to disprove certain affirmative defenses, the underlying issue in Isaac's petition, the majority found that it would have been pos-

145. Id. at 140.
146. Id. Its defects notwithstanding, the Floyd opinion suggests that Justice Brennan's analysis may have been conclusory on this point. See supra text accompanying notes 135–43.
sible to articulate Isaac's constitutional claim. But a weak defense was held not to constitute cause under Sykes: "Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." The tacit issue of ineffective assistance of counsel could have been raised in Ohio postconviction proceedings and, in the event of an unfavorable outcome, would have put Isaac's petition in a wholly different posture regarding the availability of federal review. Thus, petitioners like Isaac find themselves trapped by procedural subtleties, with the Supreme Court, on the one hand, suggesting that the state courts should carry out the Ragen imperative before access to the federal courts is available and with the state courts, on the other hand, insisting that finality of judgment ranks among the highest of legal values.

III. THE 1982 OHIO SUPREME COURT DECISIONS

Completing the current picture of the availability of postconviction relief in Ohio requires a brief consideration of three recent Ohio Supreme Court decisions. The three decisions are almost anticlimatic after Isaac and add little to the law in the field. The policy considerations on which they rely and the inconsistent implications they reveal, however, illuminate the crux of the postconviction relief dilemma.

*State v. Roberts,* decided in July 1982, is largely a mechanical reaffirmation of the Perry doctrine. In *Roberts* the supreme court held that res judicata precludes a petitioner from asserting constitutional issues in a postconviction proceeding if he fails to raise these issues in a motion to certify the record that was previously filed with the supreme court and overruled. The defendant had been indicted for obstructing justice as a result of events that occurred at her residence when police came to arrest her sister. The sister, however, was never indicted. The court of appeals reversed defendant's conviction on the ground that a conviction for obstructing justice can be sustained only if the person allegedly concealed is convicted. The court of appeals did, however, enter a judgment of conviction for the lesser included offense of resisting arrest. On appeal to the Ohio Supreme Court both parties focused on two issues: whether resisting arrest is a lesser included offense of obstructing justice and whether the court of appeals' action

149. Id. at 134.
151. 1 Ohio St. 3d 36, 437 N.E.2d 598 (1982).
152. Id. at 36, 437 N.E.2d at 598-99.
153. Id. at 37; 437 N.E.2d at 599.
154. Id. at 36-37, 437 N.E.2d at 599.
reducing the verdict to the lesser offense was proper. The appeal was denied, and the defendant filed in the trial court a petition for postconviction relief, which alleged constitutional violations resulting from the modification of the conviction. The court of appeals affirmed the trial court’s dismissal of the petition on the basis of res judicata.155

The issue in Roberts was whether the Perry doctrine precluded review of any or all of the issues asserted in the postconviction proceeding.156 Petitioner argued that the factual context of the case created an exception to Perry because the issues raised in the postconviction petition did not come into existence until after the court of appeals had rendered judgment in the direct appeal. Hence, petitioner had had no opportunity to litigate the constitutional issues.157 On the basis of its appellate jurisdiction as a matter of right in cases from the courts of appeals dealing with state or federal constitutional questions,158 the supreme court stated that petitioner could have raised the constitutional issues in her motion to certify the record on direct appeal. Thus, her failure to raise them resulted in a default under Perry.159 Since petitioner had pursued state postconviction remedies, were she to seek relief in the federal courts, she would be able to clear the exhaustion hurdle but would probably not meet the cause prong of the Sykes standard. Arguably, the Roberts decision was correct on the law, but like Engle v. Isaac160 it implicitly raises the possibility of an ineffective assistance of counsel claim.

Perhaps most interesting in the opinion is the policy rationale advanced for the court’s holding. Concerned about “the consequences which would flow from allowing petitioners to assert issues which have not been presented at the earliest possible opportunity,”161 the court raised the double specters of defendants who might “sandbag” constitutional issues in the hope that their claims would prevail on postconviction review and defendants who might bypass direct appeal to deny the supreme court the opportunity for initial review of the trial court’s verdict of guilty.162 To allow a petitioner to litigate constitutional issues in postconviction proceedings when the issues could have been raised on direct appeal would be to relegate the trial court “to disposing of the action on technicalities or collateral issues, as opposed to the merits.”163 Ironically, this representation of the result to be avoided aptly characterizes Ohio postconviction jurisprudence. At least since Perry the decisional law on postconviction relief has been based on procedural shortcomings almost to the exclusion of any deliberation on the merits.

155. Id., 437 N.E.2d at 599-600.
156. Id. at 38, 437 N.E.2d at 600.
157. Id.
158. See OHIO CONST. art. IV, § 2.
159. 1 Ohio St. 3d 36, 38-39, 437 N.E.2d 598, 600-01 (1982).
161. 1 Ohio St. 3d 36, 39, 437 N.E.2d 598, 601 (1982).
162. Id.
163. Id.
The outcome of Roberts was not surprising given Ohio precedent. In the Roberts opinion Engle v. Isaac formed a subtext that was never far from the surface of the former's policy rationale. Less than a month after Roberts, with its restrictive approach to the availability of postconviction relief, the same court in State v. Mapson, a six-to-one per curiam decision, seemed more inclined to make postconviction relief available. The case presented only a procedural issue dealing with the timeliness of an appeal from the denial of a petition for postconviction relief; the opinion does not reveal the substance of the petitioner's claim. The petitioner's attempt to seek postconviction relief had been dismissed by the trial court; while the journal entry noted that findings of fact and conclusions of law had been filed, as required by section 2953.21, they were actually not filed until more than seven months later. Meanwhile, petitioner's appeal to the court of appeals was overruled because it had not been filed within the specified period. The court accepted petitioner's contention and held that a judgment denying postconviction relief is incomplete without the findings of fact and conclusions of law. Thus, the entry of an incomplete judgment does not commence the running of the time period for filing an appeal. This outcome is but a logical extension of the court's position in earlier decisions on compliance with statutory procedure.

A series of policy reasons justified the court's position: the need to apprise the petitioner of the grounds for the trial court's action and to establish the record for appellate review, the need to decrease the workload of the courts of appeals, and the need to discourage judicial disinterest. Thus, the need to conform to the spirit and the letter of the Post-Conviction Remedy Act dictated a lenient approach to petitioner's procedural mistake. Justice Krupansky, author of the Roberts opinion, dissented, stressing that postconviction proceedings were civil proceedings governed by the Rules of Appellate Procedure. Relying on an earlier statement by the court that these rules supersede all procedural statutes in conflict with them, Justice Krupansky insisted that the absolute thirty-day limit for the filing should have been observed and that the petitioner should have requested an extension or sought a writ of mandamus to compel filing of the findings of fact and conclusions of law. Most striking is the dissent's recourse to policy justifications echoing the insistence in Roberts on the integrity of the judicial system. Justice Krupansky concluded: "Furthermore, it is plain to me the majority . . . has

164. 1 Ohio St. 3d 217, 438 N.E.2d 910 (1982) (per curiam).
165. Id. at 218, 438 N.E.2d at 911.
166. Id. at 217, 438 N.E.2d at 911.
167. Id. at 218, 438 N.E.2d at 911-12.
168. See supra text accompanying note 42.
170. Id. at 218-19, 438 N.E.2d at 912-13.
171. State v. Hughes, 41 Ohio St. 2d 208, 210, 324 N.E.2d 731, 733 (1975).
disrupted the orderly progression of cases through the appellate process. In addition, their holding will create chaos in the legal community since attorneys will become increasingly unsure of how this court will administer the appellate rules.\textsuperscript{173} Because the procedure for handling postconviction relief petitions has been firmly established, the trial court’s negligence in the \textit{Mapson} case warrants some relaxation of the Appellate Rules. Speculations about disorder and chaos can hardly justify a rule-bound outcome contrary to the spirit and the letter of the underlying statute. Finally, any possible question of the merits of the petition cannot be reached when the traditions of the judicial institution preclude review.

The importance of the third decision, \textit{State v. Cole},\textsuperscript{174} decided in December 1982, lies in its treatment of one of the only theories for postconviction relief that may still be viable for Ohio petitioners—ineffective assistance of counsel. In \textit{Cole} the petitioner had been charged with rape and attempted rape. After initial pleading he later waived prosecution by indictment, entered no contest pleas to reduced charges, and was found guilty and sentenced.\textsuperscript{175} On appeal the court of appeals affirmed the conviction. Proceeding \textit{pro se}, the petitioner filed a motion to vacate judgment and sentence; the motion was subsequently treated as a petition for postconviction relief. Basing his claim on evidence that was not part of the record, petitioner claimed that he had been denied effective assistance of counsel. On res judicata grounds the trial court dismissed the petition without a hearing; the court of appeals affirmed.\textsuperscript{176} Although acknowledging that ineffective assistance of counsel constituted a major exception to the \textit{Perry} doctrine, the Ohio Supreme Court refused to extend that exception to the situation under consideration because new counsel had represented the petitioner on direct appeal. Thus, nothing prevented raising that issue once the case had gotten beyond the trial court. The court went on to hold that the evidence adduced in support of the petition seemed contrived and that the record showed overwhelming evidence of trial counsel’s competence.\textsuperscript{177} The \textit{Cole} decision leaves open, however, the question of how the defendant is to proceed should the new counsel prove ineffective.

In view of the evidentiary basis for the decision, the opinion signals that the \textit{Perry} doctrine will be invoked whenever possible and that a petitioner must follow the dictates of \textit{Roberts} by raising every conceivable constitutional issue at the earliest possible point. The policy cited to justify this approach is the avoidance of frivolous appeals, whence the need to circumscribe the inherent difficulty of postconviction review.\textsuperscript{178} In sum, \textit{Cole} adds

\textsuperscript{173} \textit{Id.} at 221, 438 N.E.2d at 914.
\textsuperscript{174} 2 Ohio St. 3d 112, 443 N.E.2d 169 (1982).
\textsuperscript{175} \textit{Id.} at 112, 443 N.E.2d at 170.
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 113-15, 443 N.E.2d at 171-72.
\textsuperscript{178} \textit{Id.} at 115, 443 N.E.2d at 172 (relying on the analysis in \textit{State v. Milanovich}, 42 Ohio St. 2d 46, 51, 325 N.E.2d 540, 543 (1975)).
little to the law of postconviction relief. But an enigmatic remark near the end of the opinion may well hold the key to the court's willingness to review the case: "Although the court which reviewed appellant's petition could have based its decision on his failure to state a justifiable claim for relief, we cannot fault the court for its choice of grounds upon which it predicated its decision." The supreme court seems to suggest that Cole's petition was legally insufficient; the evidence simply would not support the claim. And yet that wholly appropriate ratio decidendi is eschewed in favor of a disposition that, bolstered by a shallow, self-evident policy rationale, creates yet another procedural trap for Ohio petitioners. Perhaps knowingly, the Ohio Supreme Court's decision will continue to displace the burden of deciding petitions for collateral review from the state courts. By making the procedural requirements for raising the issue of ineffective counsel as stringent as possible, the court has maintained the potential for conflict between the federal and the state courts.

Thus, the recent Ohio decisions send two very different messages. When, as in Mapson, judicial carelessness threatens to deny a petitioner even minimal review of his plausible constitutional claim, the burden of procedural exactitude is not on the petitioner. But in other contexts, even those like Cole in which petitioners traditionally have had some hope of success in the state courts, the burden of procedural exactitude falls very heavily on the petitioner. Finality of judgment and the prominence of judicial proceedings are clearly the prevailing values in postconviction relief. Therefore, criminal defense in Ohio is more than ever a matter of tactics and especially of handling constitutional claims that figure into it, or might arise during it, with the greatest of care.

IV. ANALYSIS OF THE PRESENT STATE OF THE LAW

A. Practical Implications for Ohio Petitioners Seeking Postconviction Review

A full understanding of the present state of the law of postconviction remedies in Ohio has required retracing the history of the original statutes and the development of the state decisional law that has defined the scope and availability of collateral review of criminal convictions. The federal courts' handling of the scope and availability of habeas corpus review is no less important since it has served as an alternative mechanism for convicted individuals to assert their federal rights. In the present state of affairs federal-state relations in this area are in disequilibrium. Henceforth, the strategy of petitioners is likely to be determined by the future direction of the Sixth Circuit Court of Appeals, by whether it hews to the rule of Isaac or attempts to

179. 2 Ohio St. 3d 112, 115, 443 N.E.2d 169, 172 (1982).
harmonize the Keener doctrine with the restrictions imposed by recent Supreme Court decisions.

A second consequence follows from the present state of the law. As a practical matter, individuals convicted of crimes in the Ohio courts will choose to press their claims on the theory of ineffective assistance of counsel for three reasons. First, this theory is the most viable exception to the Perry rule. Second, provided that the petitioner does not run afoul of the timing requirements imposed by the Cole decision, it will be possible to raise the issue on postconviction review. Last, and most important, because the asserted right is federal in nature, it will also be possible to preserve it in federal court if the outcome in state court is unfavorable, assuming that the Sykes cause and prejudice standard is met. Should the individual decide, or be obliged, to change counsel prior to the completion of direct review, under Cole failure to assert ineffective assistance of counsel will result in a forfeiture of any alleged claim.

The appellant’s task in the state courts will not be easy. His case must meet the two-part standard articulated by the Ohio Supreme Court in State v. Lytle:

First, there must be a determination as to whether there has been a substantial violation of any of defense counsel’s essential duties to his client. Next, and analytically separate from the question of whether the defendant’s Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel’s ineffectiveness.

The burden of showing the first part of the standard is on the appellant since a licensed attorney is presumed competent. The test for deciding this issue is “whether the accused, under all the circumstances, . . . had a fair trial and substantial justice was done.” Concerning the burden of proof on the second part of the standard, the Lytle court indicated its willingness to accept the predominant authority in the federal courts. The initial burden is on the appellant because the claim resulted from the acts of the defendant’s lawyer rather than from the state’s conduct; hence, to impose the initial burden on the State would penalize the prosecution for acts that it could not have controlled.

The predicament that the Lytle test created for postconviction petitioners became apparent four years later in State v. Jackson. In Jackson the trial

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180. See supra text accompanying notes 74–76.
181. See supra text accompanying notes 174–79.
182. 48 Ohio St. 2d 391, 358 N.E.2d 623 (1976).
183. Id. at 396–97, 358 N.E.2d at 627.
184. Id. at 397, 358 N.E.2d at 627.
186. 48 Ohio St. 2d 391, 397, 358 N.E.2d 625, 627 (1976) (following McQueen v. Swenson, 498 F.2d 207, 218 (8th Cir. 1974)).
court had summarily dismissed the postconviction petition, which was based in part on ineffective assistance of counsel; although the court of appeals reversed, the supreme court found the summary dismissal proper. The court stated that a postconviction petitioner bears the burden of submitting evidentiary documents "containing sufficient operative facts to demonstrate the lack of competent counsel and also that the defense was prejudiced by counsel's ineffectiveness." Notably, the trial counsel, appointed only one week before trial as a substitute for the original trial counsel, stated in an affidavit that he had had insufficient time to prepare adequately. The supreme court found that petitioner had not met his initial burden of demonstrating that substantive grounds for relief existed and that an evidentiary hearing was required under section 2953.21(E) of the Ohio Revised Code. The dissent, however, asserted that the constitutional claim was facially sufficient and argued that a hearing was required because the claim depended on evidence that was outside the record. In the dissent's view petitioner was within the rule of State v. Milanovich: a petitioner for postconviction review has state substantive grounds for relief when the claim is sufficient on its face to raise a constitutional issue and when the claim depends on factual allegations that cannot be determined by examining the files and records of the case.

A petition based on a claim of ineffective assistance of counsel is vulnerable in the Ohio courts. Given Jackson, such a claim is subject to dismissal even if the legal sufficiency of its evidentiary basis could be established only by a hearing. The flaw in this standard lies in the predicament it creates for the petitioner. Only the most blatant incompetence is apt to appear on the face of the record. While the petitioner has the right to support his petition with documentation, it is unlikely that this means will be effective for substantiating his theory unless attorneys can be convinced to be utterly candid in affidavits concerning their alleged incompetence. Testimony at a hearing, as provided for in section 2953.22, would be more effective in developing the appropriate evidence. Should the petition survive initial scrutiny, the petitioner faces a heavy burden of proof. Actually, the test defined in Lytle is nearly as stringent as the Sykes cause and prejudice standard in the construction given it by Isaac.

That ineffective assistance of counsel remains central as both a basis for postconviction review and an avenue to federal review is reflected in the

188. 64 Ohio St. 2d 107, 107-08, 413 N.E.2d 819, 819-21 (1980).
189. Id. at 111, 413 N.E.2d at 822.
190. Id. at 107-08, 413 N.E.2d at 820-21.
191. Id. at 113, 413 N.E.2d at 823.
192. 42 Ohio St. 2d 46, 325 N.E.2d 540 (1975).
194. See supra note 23.
195. See supra text accompanying notes 125-31.
inconsistency of the Ohio test with the current test in the Sixth Circuit. While
the Ohio test focuses on unfairness at trial, the Sixth Circuit has adopted a
higher, more professionally oriented standard: "[C]ounsel must be reason-
ablely likely to render and must render reasonably effective assistance. Counsel
must perform at least as well as a lawyer with ordinary training and skill in the
criminal law and must conscientiously protect the defendant's inter-
est . . . ." 196 Because the Ohio courts do not have the last word on the federal
constitutional right to effective counsel, the same frustration of comity and
federalism that the Isaac court sought to abate may subsist as petitioners seek
review under the more favorable federal standard for effective assistance of
counsel.

Three results are likely to flow from petitioners’ attempts to rely primari-
ly on the theory of ineffective assistance for postconviction relief. First, the
defense attorney’s role will become increasingly difficult because of the
perception that anything less than a perfectly mounted defense will result in
forfeiture of rights. Without a clear statement from the Supreme Court on the
content of the sixth amendment’s requirement of effective assistance of
counsel, federal collateral review, which offers no assurance of consistent
results, will be the mainstay of adjudication on this issue. Reliance on sixth
amendment doctrine to safeguard constitutional rights and resultant findings
of ineffectiveness would encumber delivery of legal services by failing to shift
to the states the burden of maintaining high standards of professional com-
petence. 197 Second, because the volume of petitions and the trend to pursue
habeas review in the federal courts will not abate, the judicial work load will
not be reduced. As long as he meets the Cole timing requirements, the peti-
tioner will have every reason to pursue review through the state courts and on
through the federal courts. Amelioration of federal-state judicial relations will
not result from such a situation, and the legal profession may find itself with
an added burden of self-regulation. Last, state trial courts are increasingly
likely to become the principal forum of constitutional adjudication for
criminal jurisprudence. Restrictions on the availability of review will compel
scrupulous defense attorneys to raise and litigate every plausible constitu-
tional claim that matures prior to or during the trial. The length and complex-
ity of criminal trials will increase accordingly.

B. Judicial Efficiency and Dignity Versus Full and Fair Adjudication

The present law of postconviction review in both the Ohio and the federal
courts has resulted from important shifts in policy. Among the crosscurrents
that have produced the present state of affairs, certain appear to have a shared
significance at both the federal and state levels. Concern for comity and

197. Comment, Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims, 130
federalism is no doubt the broadest policy rationale invoked in the recent decisions. Indeed, it was among the implicit considerations in Young v. Ragen that became explicit in Case v. Nebraska when the Supreme Court renewed its injunction to the states to create meaningful postconviction review procedures.

The shift that has occurred on the questions of comity and federalism appears in the ends to which these arguments are put. In Case and Ragen the desirability of a state’s retaining responsibility for its own criminal procedure and any concomitant federal constitutional implications outweighed the desirability of maintaining the federal courts’ role as ultimate arbiters of federal constitutional protections. The same consideration of avoiding federal intervention is equally vital in Lundy and Isaac. If Ragen stands for the principle that the onus is on the states to do something so that the federal courts will not have to, Lundy stands for the corollary that the federal courts are not to assume the state courts’ burden under Ragen. The invocation of comity and federalism veils the consideration that everyone recognizes but hesitates to confront candidly: petitions whose merits are dubious will be filed. Until and unless the Sixth Circuit falls into line with Lundy and Isaac, the impetus to seek federal review will not diminish, and criminal defense lawyers will be compelled not to yield, but to devise new strategies. Thus, the goal of harmony between the state and federal courts in Ohio may be achieved only at the cost of the real possibility that meritorious constitutional claims will go unreviewed. The Burger Court’s retrenchment from the Warren Court’s expansive view of habeas corpus reflects the former’s position that state courts can be entrusted with enforcement of federal law, that the risk of error is offset by the availability of direct review in the Supreme Court, and that relitigation in the federal courts disserves federal-state judicial harmony. Ultimately, the policy of comity and federalism that justifies restricted availability of federal habeas corpus review reaffirms the sufficiency of the rigor and correctness of criminal prosecution in state trial courts.

Aside from the practical ramifications for trial court dockets and procedure, important policy questions arise from making state trial courts the principal forum for adjudication of constitutional protections within the criminal process. Although it is often argued that federal review of federal constitutional claims is preferable to state court review because of disparity in competency, objectivity, and resources between the two judicialities, a more significant consideration may be institutional orientation.

199. 381 U.S. 336, 339-40 (1965) (Clark, J., concurring); see also id. at 344-46 (Brennan, J., concurring).
201. See supra text accompanying notes 127 & 173.
202. Concededly, the state trial court’s fact-finding process often plays a critical role in the controversy.
203. Id. at 1121-27.
The institutional differences between state and federal courts indicate the need for the federal judiciary to be the final arbiters of constitutional claims. From the standpoint of professional practice, federal judges are more likely to make astute applications of federal law and to recognize both the extraterritorial implications of their decisions and the value of uniform application of constitutional principles. From the standpoint of social organization, federal judges are likely to be influenced less by the objectives of state criminal law and its enforcers than by the individual and countermajoritarian perspective of the Bill of Rights. Because the federal statute reflects a broader electorate than that which selects state judges, the role of the federal judiciary is integral to effectuation of the federal legislative imperative. Historically state courts have been insensitive to constitutional rights; thus federal habeas corpus review serves not only a corrective, but also a deterrent, purpose. Potential reversal by federal courts may do more than institutional factors to create parity between the federal and state judiciaries. Above all, to the extent that the federal statute represents Congress' determination that federal tribunals will vindicate federal rights, the concern for comity, the obviation of friction between the state and federal courts, that has dominated the recent direction of the law may be inapposite.

Notwithstanding federal-state disparities, closing the doors of both the Ohio and the federal courts bespeaks a policy that values efficient judicial proceedings more highly than either the scrupulous protection of individual rights or the maintenance of safeguards within the criminal process. Without legislative action, the immediate results will be increased risk that the innocent will be convicted and that a defense attorney's error, inexperience, lack of diligence, or tactical decision will produce an irremediable forfeiture of rights. Furthermore, unlike an individual who is a losing party in other forms of litigation, the person convicted of a crime is subject not only to fine or imprisonment, but also to a range of detrimental consequences. He may

207. Id. at 667.
208. Id. at 667-68.
209. Id. at 669. See generally Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 WM. & MARY L. REV. 639 (1981) (redundancy in the design of a system assures reliability; the dual judicial system reflects the social value of systems in conflict with one another). But see McGowan, The View from an Inferior Court, 19 SAN DIEGO L. REV. 659 (1982) (collateral attack on state criminal convictions rankles state-federal judicial relations; federal courts should not have to exercise supervisory authority over state criminal law unless justice necessitates it).
210. Arguably, shifting the burden of constitutional protection to state courts is justified to the extent that the states are best situated to decrease the frequency of procedural defaults and to promote professional skill. Comment, Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims, 130 U. PA. L. REV. 981, 1000-03 (1982).
suffer statutory disabilities and sanctions such as impeachment in future trials or denial of parole, as well as the loss of his personal liberty and the continuing stigma of being a convicted criminal.\textsuperscript{211} All the collateral effects of conviction need to be weighed carefully in any policy deliberation.

The policy considerations that have guided the Ohio Supreme Court decisions on postconviction review and regained prominence in the United States Supreme Court decisions are actually all familiar. What is new about the policy arguments in these decisions is the use made of them. As Justice Brennan's dissent points out, the \textit{Isaac} opinion illustrates the application of policy in a way that makes it the controlling consideration in legal reasoning.\textsuperscript{212} In the words of Justice Brennan, "The Court's analysis is completely result-oriented, and represents a noteworthy exercise in... judicial activism..."\textsuperscript{213} Making habeas review available in the federal courts entails significant costs, according to the majority; it extends the ordeal of the trial, degrades the prominence of the trial, deprives society of the right to punish admitted offenders, and strains federal-state judicial relations.\textsuperscript{214} But the policy reasons that would justify placing finality of conviction before the accuracy of the trial's truth-finding function, punishment of offenders before the fair allocation of the burden of proof, and comity before the principle of federal constitutional supremacy\textsuperscript{215} all point to a preference for tolerating the risks identified above. The \textit{Isaac} majority attempted to respond to Brennan's dissent by insisting that the majority opinion was adjudicating the claims of each of the petitioners and that it did not seek merely to expound the law.\textsuperscript{216} These assertions, however, belie the underlying conceptual strategy of the majority opinion. Policy considerations enable the Court to project the potential undesirable consequences of deciding the case in a given way. From this decisional first principle two lesser principles of adjudication follow. First, policy principles are logically prior to production of a just decision; that is, the outcome of a given case as an adjudication of the issues matters much less than the pronouncement on general policy directions that will guide the judiciary. Second, and as a consequence, the substance of the claim, as distinguished from the substance of some other claim, is an ancillary matter.

The operation of the same factors is still more apparent in the recent Ohio Supreme Court decisions. The opinion in the most far-reaching of these decisions, \textit{State v. Roberts},\textsuperscript{217} purports to decide the issue on the basis of the

\textsuperscript{213} Id. at 144.
\textsuperscript{214} 456 U.S. 107, 126–28 (1982).
\textsuperscript{215} Id. at 146–48 (Brennan, J., dissenting).
\textsuperscript{216} 456 U.S. 107, 123–24 (1982).
\textsuperscript{217} 1 Ohio St. 3d 36, 437 N.E.2d 598 (1982).
court's appellate jurisdiction, but hastens to make explicit the policy assumptions that legitimate its operative ratio decidendi:

The propriety of our conclusion is emphasized when one considers the consequences which would flow from allowing petitioners to assert issues which have not been presented at the earliest possible opportunity. Defendants would be encouraged to deliberately refrain from advancing constitutional issues on an original appeal to this court in the hope that their claims would ultimately be allowed on postconviction relief.\textsuperscript{218}

The opinion then speculates about the frustration of the state's enforcement of its criminal code by defendants who had the tactical acumen to "sandbag" constitutional claims.\textsuperscript{219} In this scenario deserved convictions would be lost to technicalities and collateral issues. A perfectly just legal system would not require collateral review. But implicit in the Sixth Circuit's approach to habeas corpus relief has been the lingering suspicion that the Ohio courts have responded inadequately to the imperative of constitutional protections within the criminal process. That approach, in turn, rests on the implicit assumption that, given the high stakes for the individual convicted of a crime, the federal courts are better able to handle the attendant constitutional issues. The increase in crime and the increased number of petitions for collateral review pose very real problems; however, the recent state and federal decisions are likely not to stem the flow of petitions for collateral review, but only to change its course. Claims based on the constitutional right to effective assistance of counsel are undoubtedly the only way out of the present dilemma. Thus, despite recent developments in the federal law, reliance upon federal review will not lessen, but will only proceed from a different theory.

In the present state of affairs an Ohio petitioner for postconviction relief finds himself facing an irreducible contradiction. The Perry doctrine denies postconviction access to the state courts, which have been charged with primary responsibility for the integrity of the criminal process; the Lundy and Isaac decisions deny postconviction access to the federal courts, which have the ultimate word on questions of constitutional law. Short of legislative action, if the earnest petitioner is to have his day in court, it will depend on the ability of the federal courts to give weight to the subtle conceptual distinction drawn by the court in Floyd v. Marshall\textsuperscript{220} on the basis of its close reading of the text of the federal habeas corpus statute. According to that distinction, the exhaustion requirement for federal habeas corpus review applies only to state remedies that are actually available.\textsuperscript{221} Failing that distinction, the petitioner's

\begin{footnotes}
\item[\textsuperscript{218}] Id. at 39, 437 N.E.2d at 601.
\item[\textsuperscript{219}] Id.
\item[\textsuperscript{220}] 538 F. Supp. 381 (N.D. Ohio 1982).
\item[\textsuperscript{221}] See supra text accompanying notes 135–41.
\end{footnotes}
opportunity to be heard will depend on the court's inherent sense of equity, on its willingness to recognize shades of distinction that permit a differentiation of frivolous petitions from those that attempt to raise a fundamental issue that has yet to have a full and fair hearing. Although the state of the law in the Sixth Circuit prior to the recent Supreme Court decisions did not promote harmonious federal-state judicial relations, it had the advantage of assuring an equitable disposition of constitutional claims. The Supreme Court's efforts to cut back on the expansiveness of *Fay v. Noia* have overlooked the possibility that a reasonable, workable standard for federal review of state convictions, a standard that would be consistent with the dictates of comity and constitutional protection, is feasible.\textsuperscript{222}

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\textsuperscript{222} See supra text accompanying notes 112–14.