OPERATION OF THE OHIO POST-CONVICTION REMEDY ACT

Collateral attack on convictions by the use of a post-conviction statute is a recent development in Ohio. Judges, prosecutors and defense attorneys are encountering many problems in effectuating the statute which can be solved only by considering the entire concept of post-conviction on both a procedural and a substantive level.[1]

The Ohio Post-Conviction Remedy Act[2] was originally enacted in July, 1965, and substantially modified in December of 1967. The statute is an attempt to meet the possible federal requirement for a state procedure to hear federal constitutional claims. This requirement was suggested by the United States Supreme Court in two main cases, *Young v. Ragen*[3] and *Case v. Nebraska*.[4] In *Young* the Court stated that the federal habeas corpus requirement of exhaustion of state remedies presupposed that an adequate state remedy existed.[5] The Court granted certiorari in *Case* "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees."[6] After certiorari was granted but before the case was decided the Nebraska Legislature enacted a post-conviction statute.[7] The Court felt that on its face the statute was an adequate corrective process.

The stated purpose[8] of the Ohio act,[9] nearly identical to the

---

1 *Symposium on Post-Conviction Remedies: Foreword and Afterword*, 27 OHIO ST. L.J. 237 (1966).

2 OHIO REV. CODE ANN. § 2953.21-.24 (Page Supp. 1967).

3 337 U.S. 235 (1949).

4 381 U.S. 336 (1965).

5 Young v. Ragen, 337 U.S. 235, 238-39 (1948).

6 Case v. Nebraska, 381 U.S. 336, 337 (1965).

7 NEB. REV. STAT. § 29-3001,-04 (Supp. 1965).

8 S. 383, Ohio General Assembly, § 2 (1965) provides:

This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health and safety. The reason for such necessity lies in the fact that habeas corpus petition proceedings alleging violation of constitutional rights have increased in the courts to such an extent that a new procedure appears to be the best method of protecting constitutional rights of individuals and, at the same time, providing a more orderly method of hearing such matters. Therefore, this Act shall go into immediate effect.

9 OHIO REV. CODE ANN. § 2953.21 (Page Supp. 1967).

Nebraska law, was to provide the best method of protecting the constitutional rights of individuals and at the same time set out a more orderly method of hearing such matters, substituting it for the present habeas corpus procedure. In *Freeman v. Maxwell* the Ohio Supreme Court restricted habeas corpus relief to persons challenging the legality of confinement before conviction, persons challenging the jurisdiction of the court and persons challenging their confinement on grounds unrelated to the conviction itself.[10] This halted the flood of habeas corpus petitions in the Supreme Court and made the Ohio Post-Conviction Remedy Act the exclusive method for asserting constitutional claims by collateral attack.

The Post-Conviction Act in Ohio was basically designed to permit a person to attack his criminal conviction on constitutional grounds. Under the statute, as originally enacted and as amended, a petition is filed in the original trial court and that court decides whether substantive grounds for relief exist. If none are found the petition is dismissed. If there are substantive grounds for relief then a hearing is held and the Court then decides whether the conviction is void or voidable. The functioning of the new Act in comparison with the original statute can be examined under four headings: (1) who can file under the Post-Conviction Remedy Act; (2) what procedures are involved; (3) what are the judicial standards and bases for decision; and (4) what claims can be raised.

I. Who Can File

The original post-conviction act required that a person had to be in custody under sentence in order to file a petition. This creates problems for a person serving a sentence for a conviction stemming from a proceeding other than the one he wishes to challenge. He is forced, for no rational reason, to wait to assert his claims until he begins to serve the challenged sentence. It also creates a problem for persons on probation or parole. Ohio Courts have held that a person on parole cannot file a post-conviction petition because he is not "in custody."[11] The new Act avoids these problems by making any person convicted of a criminal offense eligible to file. The Act also takes notice of the possible changes in juvenile procedures fore-

[10] Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965). *See also* Miller v. Haskins, 12 Ohio Misc. 164, 230 N.E.2d 694 (C.P. 1967), McNary v. Green, 12 Ohio St. 2d 10, 230 N.E.2d 649 (1967).

[11] Gregory v. State, 11 Ohio App. 2d 107, 228 N.E.2d 878 (1967); Laugesen v. State, 11 Ohio Misc. 10, 227 N.E.2d 663 (C.P. 1967).

shadowed by *In re* Gault[12] by allowing persons adjudged delinquent to file petitions.

II. PROCEDURE

The new Act made some important changes in procedure primarily designed to insure that there is a prompt adjudication of the claims raised by petitioner. The Act specifically outlines the duty of the clerk. He is to docket the petition upon receipt and bring it promptly to the attention of the court. The original Act instructed the court to grant a prompt hearing; but this general instruction did not prove effective. A clerk of courts, when questioned about his procedure upon his receipt of a post-conviction petition, said that he held the petition undocketed until the petitioner sent a letter asking what was being done. Delays of six months to a year and a half were not uncommon. The Ohio Supreme Court had dealt with this problem under the original Act only to the extent of holding that a one year delay did not qualify as prompt.[13] Hopefully, specific procedures for the clerk will alert him to the importance of prompt and conscientious handling of petitions.

The clerk is also required to forward a copy of the petition to the prosecuting attorney. Under the original Act notice was served on the prosecuting attorney only when the court decided that a hearing was necessary. The service on the prosecutor and the requirement that he respond within ten days will help to speed up consideration of the petition and to identify the issues which the petitioner has presented. Clarification will result because the court will have the benefit of a prompt investigation of the claims by the prosecutor which will be made available in his demurrer, answer, or motion and possible supporting memoranda. This is especially important when the petition has been prepared by a prisoner and the issues are not clearly articulated. The right to move for summary judgment within twenty days after issues are made will also help prevent long delays. Petitioner will be aided in his attack by the provision which makes appointed counsel for the petitioner and on appeal for indigent petitioners mandatory under the new Act when the petition is "sufficient on its face."[14] Whether counsel was to be appointed was discretionary under the original Act.

Contrary to the procedure under the original Act, the new

12 387 U.S. 1 (1967).

13 State *ex rel.* Turpin v. Court of Common Pleas, 8 Ohio St. 2d 1, 220 N.E.2d 670 (1966).

14 OHIO REV. CODE ANN. § 2953.24(A) (Page Supp. 1967).

statute seems to grant an absolute right to the petitioner to be present at the hearing, thus removing the matter from the discretion of the court.[15]

Appeal procedure has been changed from civil to criminal.[16] The time for filing an appeal has thus been lengthened from twenty to thirty days and the use of delayed appeal is allowed.

III. Judicial Standards and Bases for Decision

Under the original statute a petitioner was entitled to a hearing unless the petition, files, and records of the case showed that he was not entitled to relief. What the judge could consider in deciding whether to grant relief,[17] the burden petitioner had to meet to receive a hearing[18] and the extent to which judges had to explain

---

15 Ohio Rev. Code Ann. § 2953.22 (Page Supp. 1967). *See* State v. Lawson, 12 Ohio St. 2d 9, 230 N.E.2d 650 (1967).

16 Ohio Rev. Code Ann. § 2953.23(B) (Page Supp. 1967). *See* Henderson v. State, 11 Ohio App. 2d 1, 227 N.E.2d 814 (1967), for a discussion of the appeal process under the original act.

17 State v. Lloyd, 8 Ohio App. 2d 155, 156-57, 220 N.E.2d 840, 842 (1966):

> In our opinion, the files and records referred to by the statute are those of the original criminal action being attacked by the petition to vacate. The documents which are of record in a felony case would generally be the bindover order, the indictment or information, motions, verdict and court entries. It could include a transcript of testimony and proceedings. . . .

State v. Mattox, 8 Ohio App. 65, 67, 220 N.E.2d 708, 710 (1966):

> The record shows that the judge recounted facts bearing on the issues, which facts were not presented in evidence. In passing upon the truthfulness of appellant's testimony, the court relied not upon the state's evidence alone, but upon personal recollections of what had occurred before him at the criminal trial.

18 State v. Vaughan, 7 Ohio App. 2d 154, 155, 219 N.E.2d 211, 212 (1966) presented a rather restrictive interpretation:

> [T]here must be some showing that the prisoner seeking relief because of a denial of his constitutional rights has, in fact, suffered a denial of those rights or, at least, some matters must appear that compel the trial judge to call for a full disclosure of the things that did occur when the prisoner was accused of participating in a crime.

State v. Williams, 8 Ohio App. 2d 135, 136, 220 N.E.2d 837, 838 (1966) took a more liberal approach:

> The petition alleges grounds for postconviction relief under Section 2953.21, Revised Code. The record of the original criminal proceedings does not fully rebut the allegation. Accordingly, in our opinion, appellant was entitled to an evidentiary hearing in which he would be provided an opportunity to prove his allegations.

More recently in State v. Bryant, 15 Ohio St. 2d 62 (1968), the Supreme Court of Ohio stated that:

dismissal[19] created most of the litigation under the statute. The new Act retains the same language[20] but contains an explanation of what the petitioner has to show (substantive ground for relief) and what may constitute files and records.[21] In addition, the new Act requires that findings of fact and conclusions of law be made whether a hearing is held or not.[22] This requirement will allow effective appellate review of all post-conviction proceedings, not just those in which a hearing is held. It will also insure that the court has made a conscientious investigation into petitioner's claims.

There is no reason to suppose that the right to file additional documents or the right to amend the petition was not available. Any possible doubt is removed by the language of the new Act. It specifically provides that supporting affidavits and other documentary evidence may be filed by petitioner.[23] Petitioner may also amend his petition before the prosecutor responds without leave of the court and after the answer, demurrer, or motion with leave of the court.[24] This provides a better chance for petitioner to show that he does have substantive grounds for relief.

One additional procedural requirement which created some difficulty under the original Act was not, however, altered. The petitioner still is required to file in the trial court where his original conviction occurred. This is the best place for such an action to be litigated;[25] but some complications arise when the same judge who

---

In a case where an accused is not represented by counsel at the time he pleads guilty and the record does not show whether the accused was advised of his right to counsel . . . it is incumbent on the court . . . to conduct a hearing on such questions . . . . *Id.* at 63-64.

19 Jones v. State, 8 Ohio St. 2d 21, 222 N.E.2d 313 (1966).

The court noted that the trial court did not grant a hearing on the Petitioner's claim that there was no effective waiver of counsel, dismissing the petition with the usual statement: "Petition and motions of the defendant show to the satisfaction of the court that the defendant is not entiled to relief." 8 Ohio St. 2d at 21.

The court felt that the claims of petitioner could not be answered on the files and records alone. They directed the trial court to reexamine the claims and make proper findings of fact and conclusions of law. This indicates that under the original Act, finding of fact and conclusions of law were required only when a hearing was held.

20 OHIO REV. CODE ANN. § 2953.21(E) (Page Supp. 1967).

21 OHIO REV. CODE ANN. § 2953.21(C) (Page Supp. 1967).

22 OHIO REV. CODE ANN. § 2953.21(C), (E) (Page Supp. 1967).

23 OHIO REV. CODE ANN. § 2953.21(C) (Page Supp. 1967).

24 OHIO REV. CODE ANN. § 2953.21(F) (Page Supp. 1967).

25 INSTITUTE OF JUD. ADMIN., STANDARDS RELATING TO POST-CONVICTION REMEDIES § 1.4(b) 8. 30 (Tentative Draft, 1967).

presided at the conviction of the defendant presides at the post-conviction hearing. In *State v. Mattox*[26] the court ruled that a decision based on the judge's personal recollection of events which were not on the record and not placed in evidence was a denial of rights of confrontation and cross-examination. It also resulted in the loss of the right to an impartial tribunal. If the recollections of the judge are to be used as evidence he may be sworn in as a witness and another judge must conduct the hearing.

IV. What Claims Can Be Raised

The language explaining which claims can be raised under the Post-Conviction Act was not changed. A petitioner is entitled to relief if "there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States."[27] A void judgment is one in which the court lacked jurisdiction over either the person or the subject matter.[28] This judgment is also subject to challenge under state habeas corpus[29] and is rather unusual in criminal cases.

The critical problem in this area arises when the court tries to decide which judgments are voidable. The legislature expressed the intent that this statute was to provide the best method of protecting the constitutional rights of the individual.[30]

It would seem that the best method of protecting a person's constitutional rights would require that all substantive claims be given one full hearing on the merits. But the Ohio Supreme Court in *State v. Perry* seems to throw a procedural roadblock in the path of many substantial but unlitigated claims. In that case the court decided that:

> Under the doctrine of *res judicata*, a final judgment of conviction bars the convicted defendant from raising and litigating in any proceeding, except on appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant at the trial which resulted in that judgment of conviction or on an appeal from that judgment.[31]

---

26 8 Ohio App. 2d 65, 220 N.E.2d 708 (1966).

27 Ohio Rev. Code Ann. § 2953.21(A) (Page Supp. 1967).

28 State v. Perry, 10 Ohio St. 2d 175, 178, 226 N.E.2d 104, 107 (1967).

29 Freeman v. Maxwell, 4 Ohio St 2d 4, 210 N.E.2d 885 (1965).

30 S. 383, Ohio General Assembly, § 2 (1965), quoted *supra* note 8.

31 10 Ohio St. 2d 175, 180, 226 N.E.2d 104, 108 (1967). The Court in *Perry* gave two examples of claims which would be recognizable under post-conviction. One was discovery after the conviction of the factual basis for new claim. The other was where

These claims, in the view of the court, had already been adjudicated against petitioner.[32]

Faced with a conflict between two important policies, finality of judgment and adequate litigation of constitutional claims, the court favored finality. This has resulted in nearly complete emasculation of the Post-Conviction Act.[33]

Other jurisdictions have faced this same conflict but have solved it in a somewhat different manner. Oregon has specific statutory language dealing with the problem of prior judgment.[34] If there was no appeal, res judicata does not affect errors at the trial level. After appellate review with counsel no post-conviction relief is available unless the grounds were not and could not reasonably have been raised. Illinois has developed its doctrine of res judicata by case law. In *People v. Dale* the court set a broad limit on relief available:

> The remedy provided for under the act cannot be employed to obtain another hearing upon claims of denial of constitutional rights as to which a full and final hearing on the merits has already been had.[35]

Additionally *People v. Jenning* warned against any application of the principle of finality which would prevent consideration of the merits

---

the petitioner did not have counsel or had not knowingly and willingly waived counsel either in a guilty plea or at trial.

The fact that the right the petitioner is relying upon was not yet clearly articulated by the courts would seem to be an excuse for not raising the claim at trial; but in State v. Johnson, 14 Ohio St. 2d 67, 236 N.E.2d 552 (1968), the court refused to reach the merits and dismissed the claim on the basis of *Perry*. Since the jurisdiction of the courts under the post-conviction act is similar to their jurisdiction under the old expanded habeas corpus, claims of ineffective assistance of counsel will probably remain claims which should be raised at trial or on appeal.

32 In Laugesen v. State, 11 Ohio Misc. 10, 227 N.E.2d 663 (C.P. 1967), decided just one day before *Perry*, the Common Pleas Court of Cuyahoga County decided a post-conviction claim for relief. Judge J. V. Corrigan in a well-reasoned and well-researched opinion stated:

> Common sense would seem to dictate that post conviction 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.

33 In Coley v. Alvis, 381 F.2d 870 (6th Cir. 1967) the court examined the Ohio Supreme Court's decision in *Perry* and decided that since petitioner had a lawyer and since all five of his claims could have been raised at the time of his guilty plea, Ohio's post-conviction remedy did not have to be exhausted in order to meet federal habeas corpus requirements.

34 ORE. REV. STAT. § 138.550(1), (2) (1967).

35 406 Ill. 238, 244, 92 N.E.2d 761, 765 (1950).

of the claim. But the court also stated that claims which were not presented at trial when competent counsel was present are waived.[36]

The federal post-conviction remedy[37] has restricted res judicata principles to those claims which have been previously considered and determined on appeal,[38] by habeas corpus[39] or at trial.[40] The concept of waiver is based on the definition in *Johnson v. Zerbst:* "an intentional relinquishment or abandonment of a known right or privilege."[41]

One concept common to these three jurisdictions is that res judicata should not be a bar to a decision on the merits of the claim. In Oregon and Illinois as well as in Ohio, however, there is not a sufficient distinction between res judicata and waiver. The key to the problem is to define waiver in a way which allows claims which have not been decided on the merits to be heard in a post-conviction hearing. If waiver can be so defined, not all the claims which could have been raised but were not will be eliminated. A clearly-articulated distinction between a waiver which constitutes a decision on the merits and res judicata as to a claim never asserted could revitalize post-conviction in Ohio.

The federal courts have evolved a concept of waiver which can be applied to the state post-conviction actions. In *Fay v. Noia* the Court stated that procedural defaults incurred by the applicant during state court proceedings would not be an effective waiver of federal rights in a habeas corpus action. Only a deliberate by-pass of the orderly procedure of the state courts could act as a waiver.[42]

This same reasoning could be applied to restrict the meaning of "could have been raised" in *Perry* to claims which were knowingly and intentionally omitted. A finding that a knowing, intelligent relinquishment of a right occurred is a decision on the merits that the right was not violated. A waiver based on state law procedural requirements does not reach the merits of the claim.[43] The basic rationale of post-conviction proceeding is to give all claims a decision

36 411 Ill. 21, 102 N.E.2d 824 (1952).

37 28 U.S.C. § 2255 (1964).

38 Dirring v. United States, 370 F.2d 862 (1st Cir. 1967).

39 Winhoven v. United States, 221 F.2d 793 (9th Cir. 1955).

40 Lampe v. United States, 288 F.2d 881 (D.C. Cir. 1961); Earley v. United States, 263 F. Supp. 522 (C.D. Cal. 1966).

41 304 U.S. 458, 464 (1938).

42 372 U. S. 391, 438 (1963).

43 INSTITUTE OF JUD. ADMIN. STANDARDS RELATING TO POST-CONVICTION REMEDIES § 6.1, 89 (Tentative Draft, 1967).

on the merits. Waiver should be an affirmative defense to any claims made by petitioner and the burden would be on the State to show an intentional affirmative waiver. This would reopen Ohio post conviction remedies to many of the claims which are ordinarily made after conviction but are foreclosed by *Perry*.[44]

V. The Post-Conviction Act in Franklin County, Ohio

An investigation of the way a specific jurisdiction has reacted to the Post-Conviction Act is necessary in ascertaining the statute's actual impact on criminal procedure.

Franklin County has a large volume of criminal cases which give rise to many post-conviction actions.[45] The attitude of the judges toward the post-conviction action and the practical problems which the court and the prosecutor face are probably typical of the situation throughout the state.

In one transcript of a post-conviction hearing a judge expresses attitudes which are not unreasonable or uncommon even though they are put forth in a somewhat extreme manner.[46] The judge is

---

44 For thirteen different grounds for relief which should be cognizable under a post-conviction statute, *see A Post-Conviction Procedure Act*, 2 Harv. J. Legis. 189-90 (1965).

45 Over 1100 indictments were returned by the Grand Jury in 1967.

46 State v. Williams, Docket No. 37,224 (C.P. Franklin County April 6, 1967), (Rev'd March 19, 1968).

The Court: You didn't ask for counsel?

The Witness: Because I didn't have no money for counsel so I didn't know I was entitled to one.

The Court: The Judge asked you if you wanted an attorney?

The Witness: No, he didn't.

The Court: I was the Judge.

The Witness: Well.

The Court: Do you remember me?

The Witness: I can't say that I do remember.

The Court: I asked you if you had an Attorney.

The Witness: No one asked me anything like that.

The Court: Asked you how you plead. The Judge asked you if you understood the charge, didn't he?

The Witness: At that time I was in sort of like a daze, I don't remember —hardly remember anything.

The Court: Do you remember about stealing this money from Mr. Hawkins?

The Witness: I don't think that is relevant.

The Court: It is very relevant. I asked you if you remember stealing the money?

The Witness: That doesn't have anything to do with what I am in here for.

confronted by a man who claims that the judge failed to inform him of his right to counsel and in effect railroaded him off to prison. The judge knows what his usual procedure was and feels certain that the

---

THE COURT: Well, you better answer the question.

THE WITNESS: I don't think I have to answer that question.

THE COURT: Then you are going back to the penitentiary awfully quick. That is all.

MR. GLASCOR: If the Court pleases, I must insist that this man be given his right to make the record. If the Court wants to overrule after the record is made. The Court has asked me to come down and I am taking my time to do this and I think it should be done in a proper fashion. He has a right, as I understand it, your Honor, to make up a record in this Court and if the Court wants to overrule we know what his next step is.

THE COURT: I want him to tell the truth.

MR. GLASCOR: The Prosecutor wants to cross-examine into what the Court is asking him now, which I think it is proper to do, well and good, but I think we should be given a full opportunity to make up our record.

Q. (By Mr. Glascor) Mr. Williams, were you afforded a lawyer on arraignment?

A. No, I wasn't.

Q. Were you asked by anyone whether or not you wanted a lawyer?

A. No, I was not.

THE COURT: Well, did you want a lawyer?

THE WITNESS: I would have liked to have had one. . . .

THE COURT: If I give you a new trial and try you again then this will start all over again, do you understand that?

THE WITNESS: If this is to be, your Honor, that has to be.

THE COURT: Has to be.

THE WITNESS: Then I will take my chances.

THE COURT: For the purpose of the record, let the record show that I was present at the arraignment of this Defendant, and I had him identify all of them. I asked if he had the copy of the indictment, and I asked him if he understood the charge and he said he did. The charge was the taking of $12,000.00 from a man by the name of Hawkins. And I asked him if he had an attorney and he said, "No." I asked him if he needed an attorney and he said, "No." I asked him how he pled and he said he pled guilty and I sentenced him. Anything further? . . .

THE COURT: As far as I am concerned I am trying to find out whether substantial justice has been done. Now, do you think that you would like to have a new trial or just want to get out?

THE WITNESS: I really would like to get out. I would like to.

THE COURT: You wouldn't like to have a new trial, would you?

THE WITNESS: Well, if I had to have a new trial, your Honor, I would have a new trial, I believe.

THE COURT: You want me to bring Mr. Hawkins in here and tell me about your stealing his money?

THE WITNESS: You can.

THE COURT: I don't need to, you pled guilty and you are still guilty.

THE WITNESS: Guilty or innocence is irrelevant.

man must have been guilty for him to have accepted a guilty plea. Unfortunately this personal knowledge cannot be used[47] and the judge feels frustrated by the lack of a written record of what he is certain happened.

The fact that the question of guilt or innocence is not at issue in this proceeding is disturbing to the judge's concept of substantive justice. It is not unreasonable for him to believe that guilty men should remain in jail when their only claim depends upon unsubstantiated testimony which the judge knows is untrue but cannot rebut by the available evidence.

The judge is often confronted with another unsettling factor in the failure of the petitioner to realize the consequences if he is successful. There is the possibility that he may be retried and reconvicted, thus losing credit for time served.[48]

Judges are frustrated in their attempts to effectuate the statute by the number of frivolous and repetitive petitions which flood the courts. Petitioners would do themselves a service by eschewing the "shotgun" approach and limiting the petition to legitimate con-

---

THE COURT: Oh, no, it isn't. . . .

THE COURT: Application for relief under the post-conviction law is denied. Prisoner remanded to the penitentiary. May I say this is another example of the damages that result from the foolish laws enacted by the legislature encouraging everybody from the penitentiary to make a claim that his rights are denied and come in and lie about it when the record disproves them, and so absolutely, and the upper Courts never pay any attention to whether the fellow is guilty or not. I think it's very important to know whether they are guilty or not. This man is guilty, no question about it. His rights were all accorded in my Court. Wasn't denied counsel at all.

47 State v. Mattox, 8 Ohio App. 2d 65, 220 N.E.2d 708 (1966).

48 In the recent case of McNary v. Green, 12 Ohio St. 2d 10, 230 N.E.2d 649 (1967) the court allowed a prisoner to have the time served under a sentence which was subsequently vacated credited to a prior existing sentence. The court stated that a sentence which is vacated as invalid is invalid as of the time of imposition. Although the court distinguished this situation from one in which a vacated conviction is reimposed the principle that a prisoner has been deprived of his liberty and deserves credit for time served should apply in either situation. The withholding of such credit has a coercive effect on a prisoner with a valid constitutional claim. If he wishes to present his claim he must risk wasting all his previous time served if he is successful with his constitutional claim but is reconvicted in the subsequent trial. See the following unreported cases for examples of cases where the prisoner was not given credit for time served under a previous conviction which was reversed. State v. Walter E. Jones, Nos. 76,725, 76,726, 76,727, 76,728, 76,761 (C.P. Ct. Hamilton County, October 21, 1967); State v. Duane Packer, No. 4332 (C.P. Ct. Marion County, July 27, 1962); State v. Theodore Jackson, No. 34,996 (C.P. Ct. Franklin County, June 21, 1966). There do not seem to be reported appellate cases supporting this practice and McNary v. Green *supra* indicates a qualified disapproval of it.

stitutional claims. Courts have a duty to consider all claims but a constant exposure to unintelligible and irrelevant claims creates a negative attitude toward post-conviction as a useful or necessary remedy.

The things which disturb judges most about post-conviction are inherent in the concept of collateral attack. But the courts themselves can eliminate many frivolous claims by having a written record of all judicial proceedings leading to conviction. The most prevalent problem with post-conviction action in Franklin County arises from a lack of a transcript of arraignment proceedings. It also arises, according to Common Pleas Court Judge Leach, from the inability of judges to prophesy what the Supreme Court would do in ten years.[49] The problem is illustrated by the claim by petitioners that they were not provided counsel, were not advised of their right to counsel and did not knowingly and intelligently waive their right to counsel. The Supreme Court in *Carnley v. Cochran*[50] placed the burden on the state to establish a waiver in the face of a silent record. This ruling combined with the right to counsel guarantees of *Gideon v. Wainwright*[51] creates the presumption of a violation of petitioner's right to counsel which the state must rebut. In states like Florida where no right to counsel for indigents existed this burden on the state is probably justified. In Ohio, however, there has been for many years a statutory requirement that indigents who desire an attorney could have one appointed.[52] The fact that Ohio courts had a statutory duty to appoint counsel should have some weight. The Common Pleas Judge argues that even if the court did ascertain whether or not the defendant wanted a court-appointed attorney, they had no reason to make sure that there was a knowing and intelligent waiver to meet federal requirements because the right to counsel in state trials had not yet been declared as a constitutional right.

The finding of facts and conclusions of law set out in the footnote outline the typical Common Pleas Court decision when faced with this problem.[53] It also provides a good example of an adequate

49 Personal Conversation with Judge Leach, Dec. 17, 1967.

50 369 U.S. 506 (1962).

51 372 U.S. 335 (1962).

52 OHIO REV. CODE ANN. § 2941.50 (Page Supp. 1967).

53 Fletcher v. State, Docket No. 38,739 (C.P. Franklin County February 19, 1968):

FINDINGS OF FACT

1. That defendant Keith Fletcher was indicated by Grand Jury of Franklin County for the crimes of burglary (1 count), larceny (1 count), forgery and uttering a forged check (4 counts) on December 12, 1960.

compliance with the statutory requirement of findings of fact and conclusions of law.

VI. Conclusion

A prisoner with a constitutional claim related to his conviction has three possible state remedies. These are habeas corpus, post-conviction and delayed appeal. The usefulness of habeas corpus is

2. That on December 12, 1960, defendant Keith Fletcher appeared in open court at arraignment and entered his plea of guilty to the six counts of the indictment and was sentenced to the Ohio Penitentiary and to pay costs, counts one and two to be served concurrently and counts three, four, five and six to be served concurrently and consecutively with counts one and two.

3. That there was no court reporter present at the hearing and no transcript of the testimony of the proceedings was taken.

4. That files and records of the case are silent as to whether or not defendant Keith Fletcher was represented by counsel at the time of his plea of guilty.

5. That the files and records of the case are silent as to whether the Court advised defendant of his constitutional rights, including his right to counsel, his right to trial by jury and his right to have counsel appointed for him in the event he could not afford counsel of his own.

6. That the files and records of the case are silent as to whether there was any waiver of the right to counsel by defendant Keith Fletcher.

7. That the unrebutted testimony of the defendant Keith Fletcher establishes that he was not represented by counsel at the time of his plea of guilty, that he was without financial means to obtain counsel, that he was not advised of his constitutional rights to the appointment of counsel and that he did not waive the right to counsel.

CONCLUSIONS OF LAW

1. The Sixth and Fourteenth Amendments of the United States Constitution guarantee the right to counsel to all persons accused of crime.

2. The failure of the trial court to appoint counsel for the defendant in the absence of a waiver by the defendant of the right to counsel is a denial and infringement of the rights of the defendant under the Ohio Constitution and the Constitution of the United States.

Therefore, this Court finds that the petition of the defendant, Keith Fletcher, is well taken and that the judgment of conviction and the sentence for these offenses be and it is hereby vacated and set aside and that the defendant should be remanded to the custody of the Sheriff of Franklin County and be granted a new trial on these charges.

Pursuant thereto it is therefore further ordered that Mr. E. B. Haskins, Superintendent of the London Correctional Institution, release the body of the defendant, Keith Fletcher to the custody of the Sheriff of Franklin County, Ohio, to take and safely keep said Keith Fletcher in the Franklin County, Ohio, jail under bond as prescribed by this Court until a new trial can be had or until the defendant be further dealt with according to law.

very limited and post-conviction is severely restricted by *Perry*. Delayed appeal is available for all claims which *Perry* characterizes as ones which should be raised at trial or on appeal. It is based on the discretionary power of the court to grant an appeal even though the request is not timely. The major considerations for the court are whether the prisoner was diligent in seeking to perfect an appeal and whether there was an attorney available after conviction. An indigent prisoner who was diligent and did not have an attorney after conviction does not need to show probable error to overcome the presumption of regularity.[54] This is not a satisfactory remedy in that the court does not look to the merits of the claim. Appeal can be denied even if a valid constitutional claim exists.[55]

Prisoners can present their claims to the federal court only after the available effective State court remedies have been exhausted. Post-conviction does not have to be attempted if the claims are excluded from consideration by *Perry*. But the prisoner must attempt delayed appeal if he cannot use post-conviction.[56]

The new Post-Conviction Act makes several constructive changes in the Ohio procedure. Petitioners are now more likely to get a prompt, adequate consideration of their claims and courts will have a better understanding of what their function is.

Unfortunately the major problem as to what claims can be raised was not dealt with by the Legislature. If Ohio does not broaden its post-conviction action to handle most constitutional claims it is forfeiting control over its own criminal process. Federal courts apply the doctrine of exhaustion in habeas corpus in deference to state procedure. Since *Coley v. Alvis*, however, the federal courts have opened their doors to all the constitutional claims which seem to be excluded by *Perry*. There is no requirement that the state courts apply federal criteria for deciding whether or not to hear a claim but if they do not they are depriving themselves of the opportunity to make their own determination of the issues in cases where their criteria are less expansive than the federal criteria. This is not federal intervention in state affairs as much as it is an abrogation of responsibility by the state. Adoption of the federal concept of waiver would be a step toward asserting state control over state criminal process.

John R. Thomas

54 State v. Webb, 11 Ohio St. 2d 60, 227 N.E.2d 625 (1967).

55 Freeman v. Maxwell, 4 Ohio St. 2d 4, 210 N.E.2d 885 (1965).

56 Knox v. Maxwell, 277 F. Supp 593 (N.D. Ohio 1967).