THE OREGON APPROACH TO POST-CONVICTION RELIEF

I. INTRODUCTION

Without applauding or disparaging their validity, but taking them as facts of post-conviction-remedy-life, the recent United States Supreme Court decisions seem to reduce the question as to what post-conviction procedure we must have to an inquiry as to what kind of a role "we" desire the federal judiciary to play in the state criminal process. Although *Case v. Nebraska*[1] conveys the hope that the administration of criminal justice can remain almost exclusively a state matter, if the several states refuse to acknowledge the federalism aspect of our system of laws in the criminal law field, we may see increased participation by the federal district courts in state criminal procedure. The concurring opinions in *Case* make it clear that independence will not be tolerated if states fail to recognize and embrace without defiance the dictates of the fourteenth amendment as part of their criminal codes.[2]

Although *Case* specifically declined to consider what constitutes fair and just state post-conviction procedures under the fourteenth amendment, recent decisions viewed in light of *Case* provide clues as to what the Supreme Court of the United States will likely require. The implications of *Townsend v. Sain*,[3] for example, suggest that state post-conviction procedures should provide a full and fair evidentiary hearing on all claimed deprivations of constitutional rights. While the transcript of trial should carry a presumption of validity, it should not be irrebuttable. *Townsend* further suggests that state court decisions include specific and explicit findings of fact, fairly supported by a complete and reliable record of the hearing as well as the conclusions of law derived from those findings. Again, with *Case* in mind, *Fay v. Noia*[4] and *Douglas v. Alabama*[5] strongly warn the states to apply the doctrine of waiver narrowly in favor of the defendant. *Henry v. Mississippi*[6] makes clear that a forfeiture of a constitutional right

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[1] 381 U.S. 336 (1965). The concurring opinion of Mr. Justice Brennan states at 344:

> Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well.

[2] *Ibid.*

[3] 372 U.S. 293 (1963).

[4] 372 U.S. 391 (1963).

[5] 380 U.S. 415 (1965).

[6] 379 U.S. 443 (1965).

because of a procedural default must be justified by an overriding legitimate state interest. *Sanders v. United States*[7] clearly limits the application of res judicata when a defendant has not been afforded an opportunity for a full evidentiary hearing at which he is represented by counsel, and where all his constitutional claims were not or could not have reasonably been presented and decided on the merits. Finally, the obvious lesson of *Gideon v. Wainwright*[8] is that a post-conviction remedy should provide court-appointed counsel for those financially unable to retain their own.

Fair inferences from the above cases justify the assumption that any adequate post-conviction remedy should: (1) provide a full and fair evidentiary hearing; (2) apply doctrines of waiver and forfeiture strictly in favor of the defendant; (3) apply res judicata only when claimed deprivations of constitutional rights have been or could reasonably have been adjudicated on their merits after an evidentiary hearing; (4) provide for the assistance of counsel; and (5) require the court's decision to explicitly state the specific findings of fact fairly supported by the record and the conclusions of law derived from those findings. With these criteria in mind, this comment shall examine one state's attempt to fulfill its primary responsibility for the administration of its criminal laws. That state is Oregon whose Post-Conviction Hearing Act became effective on May 26, 1959.[9]

II. Relief Available Prior to the Act

A. *Habeas Corpus*

In order to understand the purpose and impact of the Post-Conviction Hearing Act, it is necessary to describe and analyze the modes of relief available prior to its enactment. Prior to 1959 there existed four kinds of post-conviction remedies in Oregon. The first and most effective was habeas corpus. It was guaranteed by the Oregon Constitution[10] and implemented by statute.[11] It provided a means of attacking the judgment by which the petitioner was imprisoned on the grounds that the sentencing court had neither jurisdiction of the person nor of the subject matter. This common law interpretation of habeas corpus was expanded in *Huffman v. Alexander*,[12] where it was held that a court could lose personal or subject matter jurisdiction by denying an accused his constitutional rights during the trial. The loss

7 373 U.S. 1 (1963).

8 372 U.S. 335 (1963).

9 Ore. Rev. Stat. §§ 34.330, 138.500-.680 (1963).

10 Ore. Const. art. I, § 23.

11 Ore. Rev. Stat. §§ 34.310-.730 (1963).

12 197 Ore. 283, 251 P.2d 87, *rehearing denied*, 253 P.2d 289 (1953).

of jurisdiction would thus render the conviction void.[13] In addition, only those illegally restrained could avail themselves of the writ.[14] Further, recitals in a judicial record were deemed to be absolutely true and could not be directly controverted by extrinsic evidence unless the claim of the petitioner went to the narrow question of personal or subject matter jurisdiction.[15] Although the habeas petitioner had a right of appeal, he did not have the right to court appointed counsel on appeal.[16] Since habeas corpus was a collateral attack on the judgment,[17] it was not a substitute for appeal and any nonconstitutional errors or irregularities which could have been corrected on appeal were not grounds for relief, if they merely made the judgment voidable.[18] Failure to assign as error on appeal or to make an exception in the trial court resulted in the waiver of any claim the habeas petitioner might otherwise have had.[19] Finally, res judicata applied to habeas corpus decisions with the result that any denial of the writ precluded a subsequent application for habeas corpus relief not only upon the grounds alleged, but also upon grounds which *could* have been alleged in the prior habeas proceeding.[20]

B. *Coram Nobis*

The second most important post-conviction remedy, although quite a latecomer, was coram nobis or more correctly, a motion in the nature of coram nobis. This remedy was not provided by statute but was a common law writ recognized in a very limited form by the Supreme Court of Oregon in *State v. Huffman*.[21] Before *Huffman*, coram nobis had come to the attention of the court only twice,[22] and then in cases which did not decide if this remedy was available in

13 Smallman v. Gladden, 206 Ore. 262, 291 P.2d 749 (1956).

14 Huffman v. Alexander, *supra* note 12, at 318-19, 251 P.2d at 102-03. See also Anderson v. Britton, 212 Ore. 1, 5, 318 P.2d 291, 293 (1957); White v. Gladden, 209 Ore. 53, 303 P.2d 226 (1956); State v. Huffman, 207 Ore. 372, 384, 297 P.2d 823, 836 (1955).

15 This is the historical view taken by the Supreme Court of Oregon in Huffman v. Alexander, *supra* note 12, at 314-21, 251 P.2d at 101-04.

16 State v. Delaney, 221 Ore. 620, 332 P.2d 71 (1960).

17 Anderson *ex rel.* Poe v. Gladden, 205 Ore. 538, 544, 288 P.2d 823, 826 (1955).

18 Smallman v. Gladden, *supra* note 13, at 269-70, 291 P.2d at 752-53.

19 Anderson v. Britton, *supra* note 14, at 7, 318 P.2d 294; Huffman v. Alexander, *supra* note 12, at 296, 251 P.2d at 92-93.

20 Ore. Rev. Stat. § 34.710 (1963); Barber v. Gladden, 215 Ore. 129, 136, 332 P.2d 641, 644 (1958).

21 *Supra* note 14.

22 Huffman v. Alexander, *supra* note 12; State v. Rathie, 101 Ore. 368, 200 Pac. 790 (1921).

Oregon. In *Huffman v. Alexander*[23] the court expressed confusion over the existence of coram nobis, but went on to say it was in the nature of a motion for new trial and the only relief which it afforded was the setting aside of the judgment of conviction and the granting of a new trial. Although intimating there was no right of appeal from an adverse ruling in the trial court, it was not until *State v. Endsley*[24] that the Supreme Court of Oregon finally determined it had no appellate jurisdiction in coram nobis. Since this remedy only came to the forefront some three years before the new act, there is very little case law indicating its exact scope. However, *State v. Huffman*,[25] while not specifically so holding, strongly implied in dicta that coram nobis was available to attack a void judgment in the convicting trial court only when no other adequate remedy existed. This was a result of the common law theory that coram nobis was part of the original proceeding similar to a motion to set aside or to vacate.[26] Probably the most significant aspect of this remedy was its supposed availability to a petitioner whether imprisoned or not. *State v. Huffman*[27] appeared to say, that if the petitioner was not imprisoned, coram nobis would provide relief only if, under state or federal law, further penalties or disabilities could be imposed because of a prior conviction. This becomes important under an habitual criminal statute where an accused may be given an enhanced sentence for his latest conviction because he has accumulated previous convictions. Although there was no time limit for bringing an action in coram nobis, a doctrine similar to laches would likely have been used.[28]

C. *Motion to Correct the Record and Motion to Vacate*

As an adjunct to habeas corpus and probably as a result of the latter's rule against direct contradiction of the record, there existed a third post-conviction remedy. This was a motion to correct the record. It was available only if the motion's purpose was to have a court determine whether constitutional requirements had been violated at trial and such were in contradiction of the record.[29] The very limited scope of the motion to correct the record made it a little used remedy.

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[23] *Supra* note 12, at 338, 253 P.2d at 292.

[24] 214 Ore. 537, 331 P.2d 338 (1958).

[25] *Supra* note 14, at 391, 297 P.2d at 839.

[26] See State v. Endsley, *supra* note 24.

[27] *Supra* note 14, at 417, 297 P.2d at 851.

[28] *Id.* at 419, 297 P.2d at 852.

[29] State v. Sherwood, 214 Ore. 594, 597-98 (1954) (opinion subsequently withdrawn for lack of appellate jurisdiction).

There was no right of appeal from a judgment on a motion to correct the record.[30]

A motion to vacate was the only other post-conviction remedy available and then only during term.[31] In the absence of statutory authority the Supreme Court of Oregon had no appellate jurisdiction over a motion to vacate under the doctrine of *State v. Endsley*.[32]

It is obvious that Oregon, like so many other states, was confused as to what post-conviction procedures it had, their nature, and the relief which could be afforded under them. Even a cursory reading of the ten leading cases[33] decided between 1951 and 1959 indicates the problems the Oregon courts faced in trying to provide some kind of adequate post-conviction remedy.

One further difficulty was added by *Griffin v. Illinois*[34] since the Oregon statutes lacked any provision for the payment of costs of transcripts and the fees of counsel for an indigent on appeal under existing post-conviction remedies.[35]

With this background, we can now proceed to an analysis of the act itself and its case law interpretation.[36]

III. The Nature and Scope of the Act

A. *Introduction*

The purpose of the act has been expressed by the Supreme Court of Oregon as follows:

> The Post Conviction Hearing Act was enacted by the legislature to eliminate the confusion that had arisen over the use of various common law remedies to challenge the lawfulness of a person's conviction of crime and to provide a *single and exclusive* proceeding whereby the convicted person might challenge the lawfulness of the proceedings which led to the judgment pronounced by the trial court. The legislature, however, did not abolish the ancient writ

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30 *Id.* at 600.

31 Gladden v. Kelly, 213 Ore. 197, 199-200, 324 P.2d 486, 487-88 (1958).

32 *Supra* note 24.

33 Barber v. Gladden, *supra* note 20; State v. Sherwood, *supra* note 29; State v. Endsley, *supra* note 24; State v. Brooks, 214 Ore. 535, 331 P.2d 343 (1958); Gladden v. Kelly, *supra* note 31; Anderson v. Britton, *supra* note 14; State v. Huffman, *supra* note 14; Smallman v. Gladden, *supra* note 13; Poe v. Gladden, *supra* note 17; Huffman v. Alexander, *supra* note 12.

34 351 U.S. 12 (1956) (appellate review cannot be denied solely on basis of lack of funds to procure transcript).

35 See Townsend v. Sain, 372 U.S. 293 (1963).

36 For further discussion of the act's history, see Collins & Neil, "The Oregon Post-Conviction Hearing Act," 39 Ore. L. Rev. 337, 340 (1960) [hereinafter cited as Collins & Neil].

> of habeas corpus. This is especially retained in criminal cases where the prisoner challenges his restraint upon grounds that do not challenge the lawfulness of the proceedings.[37]

The Oregon Constitution guarantees the remedy of the writ of habeas corpus to a person illegally restrained of his liberty.[38] That document also confers concurrent original habeas corpus jurisdiction in the Supreme Court of Oregon.[39] Since the legislature could not abolish habeas corpus, it was forced to make the scope of the Post-Conviction Hearing Act at least as broad as habeas corpus prior to 1959.[40] The need to provide a single remedy responsive to the decisions of the Supreme Court of the United States obviously moved the legislature to make available in one procedure all previously existing post-conviction remedies. Consequently, the influence of habeas corpus, coram nobis, and the motions to correct the record and to vacate the judgment is apparent throughout the new act.[41]

An examination of this act must begin with an understanding of the new role of habeas corpus. All other remedies were abolished.[42] Habeas corpus was limited in availability to provide relief only in situations not covered by the act.[43] Subsections 138.540(1) and (2) make clear that the act neither provides a remedy for illegal pre-conviction restraint nor illegal restraint which does not affect the validity of the judgment of conviction. Nor does it provide a remedy for non-criminal cases of illegal restraint. Illegal revocation of parole or conditional pardon and completion of sentence are examples of illegal restraint after conviction which do not challenge the validity of the judgment and for which habeas corpus is the proper remedy.[44] Examples of pre-conviction restraints which do not challenge the validity of the conviction or sentence for which habeas corpus is again the proper remedy include the custody of children and restraint in a mental institution.[45] In other words, if the petitioner can admit the

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37 Strong v. Gladden, 225 Ore. 345, 348, 358 P.2d 520, 521 (1961). (Emphasis added.)

38 Ore. Const. art. I, § 23.

39 Ore. Const. art. VII, § 2.

40 Ore. Rev. Stat. 138.530(2); see Collins & Neil at 346.

41 The act's authors state that the legislature assumed the new act would be interpreted with the aid of the new abolished remedies and habeas corpus. Collins & Neil at 337-38.

42 Ore. Rev. Stat. § 138.540(1) (1963).

43 Ore. Rev. Stat. §§ 34.310, 34.330(3) (1963).

44 Ore. Rev. Stat. 138.540(2) (1963). See Fredricks v. Gladden, 211 Ore. 312, 315 P.2d 1010 (1957); Anderson v. Alexander, 191 Ore. 409, 229 P.2d 633, *rehearing denied*, 230 P.2d 770 (1951).

45 Ore. Rev. Stat. §§ 34.310, 34.330(3) (1963). See also Collins & Neil at 343.

validity of his conviction and sentence and is still illegally restrained of his liberty, then habeas corpus is the proper remedy.[46]

B. *Proper Standing to Invoke the Act*

The first sentence of Oregon's Post-Conviction Hearing Act begins: "Any person convicted of a crime under the laws of this state . . . ."[47] Such person is eligible to file a petition for relief. The act provides special venue for petitioners not imprisoned[48] and precludes the complaint from being moot as a result of the release, parole, or conditional pardon of a petitioner during the pendency of proceedings under the act.[49] Consequently, parolees[50] and persons having served their sentences[51] are eligible to proceed under the post-conviction remedy statutes.[52] As previously noted,[53] coram nobis was available to persons not in confinement as a means of attacking a void judgment. If the prior law under coram nobis can be taken as a guide, *State v. Huffman*[54] would indicate that a person not imprisoned could attack a judgment of conviction if, under state or federal law, further penalties or disabilities could be imposed upon the petitioner because of the existing judgment. Hence, it is probable that a person in prison could attack his present habitual criminal sentence by attacking the validity of a previous conviction, the sentence for which has already been served.[55] In the only reported case since the act became effective in which the question was raised, the Supreme Court of Oregon expressly declined to answer the question and rested its decision on other grounds.[56] Nevertheless, recidivists may attack their enhanced sen-

46 Ore. Rev. Stat. § 34.310 (1963). See, *e.g.*, Strong v. Gladden, 225 Ore. 345, 358 P.2d 520 (1961).

47 Ore. Rev. Stat. § 138.510 (1963).

48 Ore. Rev. Stat. § 138.560(1) (1963).

49 Ore. Rev. Stat. § 138.560(3) (1963).

50 See, *e.g.*, Bryant v. State, 233 Ore. 459, 378 P.2d 951 (1963).

51 See, *e.g.*, State v. Huffman, *supra* note 14.

52 Ore. Rev. Stat. § 138.510(3) (1963) explicitly provides relief for persons convicted before the act's effective date of May 26, 1959, irrespective of when the petition is filed.

53 See text accompanying note 27 *supra*.

54 *Supra* note 14.

55 *Ibid.*

56 In Bevel v. Gladden, 232 Ore. 578, 580, 376 P.2d 117, 118 (1962), the petitioner questioned the validity of a 1955 conviction the sentence for which had been served. He argued that the 1955 conviction being void could not be considered in imposing an enhanced sentence under the habitual criminal statutes. Since petitioner had compiled enough other valid felony convictions to warrant the enhanced penalty, the Supreme Court of Oregon upheld the validity of his habitual criminal sentence.

tences[57] and it is extremely likely that they will be able to do so by attacking a previous conviction even though that sentence has been served.[58]

The act[59] specifically permits a petition for relief to be filed at any time,[60] *i.e.*, any time *after* conviction.[61] Since a proceeding under the act is a collateral attack on the judgment and sentence,[62] all procedures for direct attacks on the judgment of conviction must be unavailable at the time a petition is filed under the act.[63] A motion for new trial, a motion in arrest of judgment, and direct appellate review are still a part of Oregon's post conviction procedures and their *availability* precludes relief under the post-conviction remedy act.[64] The act also[65] demands that subsection 138.540(1)'s exhaustion requirement be interpreted to mean that post-conviction relief is not available if either direct appellate review, a motion for new trial, or a motion in arrest of judgment are available *at the time* a petition for post-conviction relief is filed. This is similar to the exhaustion requirement of federal habeas corpus as interpreted in *Fay v. Noia*.[66] Petitioner's failure to appeal or to avail himself of motions in arrest of judgment and new trial, however, does not bar him from post-conviction relief.[67]

Although more directly related to the grounds upon which post-conviction relief is available, subsection 138.540(2) is a corollary to

[57] See, *e.g.*, State v. Cloran, 233 Ore. 400, 377 P.2d 911 (1963).

[58] At this point it is interesting to reflect on the act's ramifications for a recidivist of the recent case of State v. Latta, — Ore. —, 405 P.2d 367 (1965). The defendant had been convicted of carrying a concealed weapon under a special statute applying only to former convicts. Latta's only previous conviction was erroneously declared void and set aside in a post-conviction remedy proceeding. Neither the parties nor the Supreme Court of Oregon denied that the judgment in the post-conviction proceeding was erroneous and that actually the previous conviction had been valid. However, the State failed to appeal and, erroneous or not, the judgment declaring the first conviction void became res judicata against the State. Latta could not therefore be considered a former convict. Consequently, Latta could not be convicted under the special statute prohibiting former convicts from carrying concealed weapons.

[59] Ore. Rev. Stat. § 138.510(2) (1963).

[60] See, *e.g.*, Tuel v. Gladden, 234 Ore. 1, 379 P.2d 553 (1963), in which the petition was filed thirty years after conviction.

[61] Ore. Rev. Stat. §§ 34.310, 34.330, 138.510, 138.540(1), 138.540(2) (1963).

[62] State v. Cloran, *supra* note 57; Brooks v. Gladden, 226 Ore. 191, 358 P.2d 1055 (1961).

[63] The act is not a substitute for appeal. State v. Cloran, *supra* note 57.

[64] Ore. Rev. Stat. § 138.540(1) (1963).

[65] Ore. Rev. Stat. § 138.550(1) (1963).

[66] 372 U.S. 391 (1963).

[67] Ore. Rev. Stat. § 138.550(1) (1963). See, *e.g.*, Barnett v. Gladden, 237 Ore. 76, 390 P.2d 614 (1964); Brooks v. Gladden, *supra* note 62.

the exhaustion requirement and is used to determine *when* post-conviction relief is available to a person convicted of a crime. If the claim of illegal restraint does not call in question the soundness of the judgment or the proceedings leading thereto which would render the judgment void, habeas corpus is then the only proper remedy.

C. *Grounds Available for Relief*

1. Meaning of "Substantial Denial"

The heart and substance of Oregon's Post-Conviction Hearing Act is subsection 138.530(1), which provides the grounds for relief, and section 138.550, which injects the much sought after finality to the criminal process by its strict and extensive res judicata and waiver provisions. Subsection 138.530(1) delimits the scope of the act, but its scope cannot be fully appreciated without a consideration of the limiting effects of res judicata and waiver. For purposes of discussion, however, grounds for relief and res judicata and waiver will be treated separately.

If, at an evidentiary hearing,[68] petitioner proves facts by a preponderance of evidence[69] establishing "a substantial denial in the proceedings resulting in . . . conviction, or in the appellate review thereof, of petitioner's [constitutional rights] and which denial rendered the conviction void,"[70] then he has an absolute right to relief.[71] The term "substantial denial" was borrowed from the Illinois post-conviction statute to indicate that relief should not be granted because of non-prejudicial technical errors.[72] This indicates the legislature was of the opinion that a defendant could be denied a fourteenth amendment due process right for which he could not claim relief under the act, if the denial was not substantial. It left to the courts the job of determining which violations of constitutional rights were serious enough to warrant relief.[73] Although it was almost two years after the enactment of the statute, the Supreme Court of Oregon in *Brooks v. Gladden*[74] interpreted the meaning of "substantial denial" to mean simply, a denial of due process.

The petitioner in *Brooks*[75] specifically relied on subsection 138.530

68 Ore. Rev. Stat. § 138.620(2) (1963).

69 Note the influence of the civil nature of common law habeas corpus.

70 Ore. Rev. Stat. § 138.530(1)(a) (1963).

71 Ore. Rev. Stat. § 138.520 (1963).

72 Collins & Neil at 345. For a discussion of the Illinois statute, see Comment, 27 Ohio St. L.J. 244 (1966).

73 *Ibid.*

74 *Supra* note 62.

75 *Supra* note 62.

(1)(a)'s "substantial denial" and the question thus presented was "whether the right of the accused to poll the jury is so essential in assuring him a fair trial that the refusal to permit the poll is a 'substantial denial' of a fundamental right protected by the Constitutions . . . ."[76] The court noted that subsection 138.530(1)(b) stated the traditional grounds for habeas corpus relief and that the scope of the writ had been extended to cases "where the trial court had initial jurisdiction but lost it by departing from due process of law, thus rendering the judgment void."[77] By thus using subsection (1)(b) to interpret subsection (1)(a), the court concluded that (1)(a) stated the essence of the grounds for relief under the expanded habeas corpus and that a simple denial of due process qualified the petitioner for relief.[78] It is at this point that the court, consciously or unconsciously, deviated from the meaning of "substantial denial" intended by the legislature.

The court stated: "Petitioner, to qualify for post-conviction relief on this ground [subsection 138.530(1)(a)'s substantial denial] has the burden of showing that he has been *denied due process of law*."[79] It should be noted that as expressed in this quotation, the word "substantial" is left out, arguably meaning that *any* denial of due process is ground for relief. The court went on to examine the question presented in terms of expanded habeas corpus beginning with the cautionary rule that its expansion did not convert that remedy into a method of appealing the conviction[80] and that habeas corpus was not a substitute for the writ of error.[81] This rule calls into play the distinction between appeal and habeas corpus. The distinction, aptly illustrated in *Brooks*, rested on a determination of whether the claimed irregularity in the trial procedure was merely an irregularity of such stature as to make the trial of an accused fall below the minimal standards of due process.[82]

In deciding petitioner's question, the court reviewed numerous federal, Illinois, and Oregon cases which support the distinction between nonconstitutional error and denial of due process. Finding nothing on the right to poll a jury, the court defined due process as

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[76] Brooks v. Gladden, *supra* note 62, at 194-95, 358 P.2d at 1057.

[77] *Ibid.* The court cites Huffman v. Alexander, 197 Ore. 283, 313-14, 251 P.2d 87, 100-01 (1952), *rehearing denied*, 253 P.2d 289 (1953).

[78] Brooks v. Gladden, *supra* note 62, at 195-96, 358 P.2d at 1058.

[79] *Ibid.* (Emphasis added.) The court cited Hawk v. Olson, 326 U.S. 271, 274-75 (1945); Smallman v. Gladden, 206 Ore. 262, 269-70, 291 P.2d 749, 752-53 (1956).

[80] Brooks v. Gladden, *supra* note 62, at 196, 358 P.2d at 1058.

[81] *Id.* at 197, 358 P.2d at 1058.

[82] Smallman v. Gladden, *supra* note 79, at 269-70, 291 P.2d at 752-53.

that which constitutes the contemporary attitudes of fair play in the legal process.[83] The court then proceeded to decide that the erroneous denial of the right to poll a jury is not such an exceptional circumstance as to be a denial of due process. The court buttressed its decision by stating that the "error" could have been redressed on appeal.[84]

Wittingly or unwittingly, the court in *Brooks*, by equating "substantial denial" with "denial of due process of law," sufficiently emasculated the word "substantial" to effectively read it out of subsection 138.530(1)(a). *Brooks* is the leading case interpreting the grounds for relief under the act; the tests it set forth have been consistently followed. If error was committed, relief is available only on appeal. If a denial of due process is committed, relief is available under the act as well. There seems to be no intermediate ground where the irregularity is a denial of due process, but not of such significance to warrant post-conviction relief. Rather, "substantial" seems to have been used to describe "error" in order to determine when such could be classified a denial of due process.

In a case where the determination of whether or not the defendant has been denied due process of law depends upon an inextricable tangle of law and fact, the element of "substantial" could be a decisive factor. On the other hand, there remains the question of whether or not relief for only a *substantial* denial of due process instead of *any* denial constitutes *adequate* relief. The Supreme Court of Oregon may have effectively precluded the presentation of this question to the federal courts thereby increasing the finality of its own criminal process.

The concluding phrase of subsection 138.530(1), "which denial rendered the conviction void," was added at the request of the Attorney General of Oregon to invoke the precedents in habeas corpus as guidelines in interpreting "substantial denial."[85] Whether or not this was intended to help make the Post-Conviction Hearing Act more liberal than habeas corpus did not make much difference after *Brooks*. Notwithstanding that error does not constitute grounds for relief under subsections 138.530(1)(a) and (b) of the act; the phrase does incorporate into subsection 138.530(1) the expanded concept of habeas corpus.[86] The more significant relevance of this phrase turns out to be something the drafters probably did not contemplate, but is more appropriately included in the discussion of section 138.520 on relief.

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[83] Brooks v. Gladden, *supra* note 62, at 199, 358 P.2d at 1059.

[84] *Id.* at 203-05, 358 P.2d at 1061-62.

[85] Collins & Neil at 345.

[86] Brooks v. Gladden, *supra* note 62, at 196, 358 P.2d at 1058.

2. Denials of Due Process

The influence of federal habeas corpus on Oregon's post-conviction remedies before and after the act is significant. Oregon adopted the expanded view of habeas corpus in *Huffman v. Alexander*[87] largely as a result of similar action by Congress and the United States Supreme Court.[88] Since *Brooks*[89] is the leading case interpreting the grounds for relief under the act, it is important to list some of the grounds considered to constitute a denial of due process. This is not to say, of course, that all of these grounds in Oregon would constitute that State's idea of constitutional violations under either the Oregon Constitution or the United States Constitution, but they are a pretty good guide for predictions. By no means complete, these grounds are: suppression of evidence,[90] amendment of an indictment without resubmission to the jury,[91] holding a trial under mob pressure and community coercion,[92] denial of counsel for a defendant in a noncapital case,[93] coerced guilty plea,[94] guilty pleas obtained by trick,[95] denial of counsel after arraignment and before trial,[96] use of perjured testimony and suppression of evidence,[97] conviction based upon a coerced confession,[98] and incompetency of appointed counsel.[99]

Compared with these grounds are errors which the court in *Brooks* cites as not amounting to a denial of due process. Those include: imposition of sentences of fine and imprisonment as cumulative rather than alternative as provided by statute,[100] introduction of incom-

87 Huffman v. Alexander, *supra* note 77, 251 P.2d at 100-01.

88 *Ibid.* See also Brooks v. Gladden, *supra* note 62, at 195, 358 P.2d at 1058. For a discussion of federal approach, see Comment, 27 Ohio St. L.J. 302 (1966).

89 *Supra* note 62.

90 Kwock Jan Fat v. White, 253 U.S. 454 (1920).

91 *Ex parte* Bain, 121 U.S. 1 (1887).

92 Moore v. Dempsey, 261 U.S. 86 (1923).

93 Wade v. Mayo, 334 U.S. 672 (1948).

94 Waley v. Johnston, 316 U.S. 101 (1942).

95 Smith v. O'Grady, 312 U.S. 329 (1941); McKeag v. People, 7 Ill. 2d 586, 131 N.E.2d 517 (1956); People v. Evans, 412 Ill. 616, 107 N.E.2d 839 (1952).

96 Hawk v. Olson, 326 U.S. 271 (1945).

97 Pyle v. Kansas, 317 U.S. 213 (1942); People v. Wakat, 415 Ill. 610, 114 N.E.2d 706 (1953); People v. Jennings, 411 Ill. 21, 102 N.E.2d 824 (1952).

98 People v. Wakat, *supra* note 97; People v. Evans, *supra* note 95; People v. Jennings, *supra* note 97; Commonwealth *ex rel.* Sheeler v. Burke, 367 Pa. 152, 79 A.2d 654 (1951).

99 People v. Morris, 3 Ill. 2d 437, 121 N.E.2d 810 (1954). For grounds available under the federal act, see Comment, 27 Ohio St. L.J. 321 (1966).

100 *Ex parte* Mooney, 26 W. Va. 36, 53 Am. Rep. 59 (1885). *But see* Ore. Rev. Stat. § 138.530(c) (1963).

petent evidence in an otherwise fair trial,[101] grand jury impaneled by a judge not in the judicial district,[102] lack of technical precision of the indictment stating the crime,[103] crime charged is objectionably indefinite,[104] members of the grand jury are not citizens as required by state law,[105] erroneous denial of a tendered defense,[106] insufficiency of evidence[107] (as opposed to a complete absence of evidence),[108] illegal arrest with defendant later brought before the court on proper complaints,[109] clerical error in the indictment charging commission of the crimes six months after trial,[110] and indictment defective in charging an offense under the habitual criminal statutes.[111]

Cases explicitly or implicitly using the test in *Brooks* as a present guide in determining what constitutes grounds for relief under subsections 138.530(1)(a) and (b) have considered the following grounds to be cognizable: ability of the prosecutor to choose between prosecution of a crime as either a felony or a misdemeanor for the same act,[112] petitioner mentally incompetent to stand trial,[113] discriminatory application of habitual criminal statute,[114] double jeopardy,[115] systematic and intentional exclusion of petitioner's race from the grand and petit juries,[116] and failure of an indictment to allege any crime.[117]

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101 Tisi v. Tod, 264 U.S. 131 (1924).

102 Harlan v. McGourin, 218 U.S. 442 (1910).

103 Dimmick v. Tompkins, 194 U.S. 540 (1904).

104 Glasgow v. Moyer, 225 U.S. 420 (1912).

105 Kaizo v. Henry, 211 U.S. 146 (1908).

106 Sunal v. Large, 332 U.S. 174 (1947).

107 *Ex parte* Lindley, 29 Cal. 2d 709, 177 P.2d 918 (1947); Commonwealth *ex rel.* Jackson v. Day, 179 Pa. Super. 566, 118 A.2d 289 (1955).

108 Thompson v. City of Louisville, 362 U.S. 199 (1960).

109 *Ex parte* Olsen, 74 Idaho 400, 263 P.2d 388 (1953).

110 Shaw v. Utcht, 232 Minn. 82, 43 N.W.2d 781 (1950).

111 Harrod v. Whaley, 239 S.W.2d 480 (Ky. 1951).

112 Lilley v. Gladden, 220 Ore. 84, 348 P.2d 1 (1959), decided before *Brooks*, was the first case reaching the court under the new act. See Broome v. Gladden, 231 Ore. 502, 373 P.2d 611 (1962); Seibel v. Gladden, 220 Ore. 147, 348 P.2d 1120 (1960). Although these cases were brought under subsection (1)(c) of Ore. Rev. Stat. § 138.530 (1963) instead of subsections (1)(a) and (1)(b) they hold that this ground is considered in Oregon to be a violation of the fourteenth amendment's equal protection clause because it permits a prosecutor to discriminate between two defendants who have committed the same act for which one could be tried for a felony and the other a misdemeanor. See also State v. Powell, 212 Ore. 684, 321 P.2d 333 (1958), which holds this to be a violation of the Ore. Const. art. I, § 20.

113 Syphers v. Gladden, 230 Ore. 148, 368 P.2d 942 (1962).

114 Bailleaux v. Gladden, 230 Ore. 606, 370 P.2d 722 (1962).

115 *Ibid.*

116 Anderson v. Gladden, 234 Ore. 614, 383 P.2d 986 (1963).

117 Barnett v. Gladden, 237 Ore. 76, 390 P.2d 614 (1964).

The following are some of the grounds asserted in post-conviction proceedings which were considered as constituting *less* than a denial of due process: failure to comply with a criminal procedural statute such as (1) charging the principal crime and the habitual criminal statute in one information,[118] (2) failure to file or to furnish the defendant with a copy of the psychiatric report made after conviction but prior to sentencing,[119] (3) failure to hold a presentence hearing on the psychiatric report,[120] (4) denial of a preliminary hearing when there exists a valid indictment,[121] or (5) denial of the statutory right to poll a jury;[122] failure of an information or indictment to state *facts* sufficient to constitute a crime;[123] hearsay assertions of a prosecutor that defendant has previous convictions;[124] new or additional evidence;[125] consideration by the court of defendant's juvenile record in imposing the sentence;[126] imposition of irregular or excessive sentence;[127] use of "volunteer" jurors;[128] and conviction resulting from mistake of fact where the proof of the jury's mistake must depend upon the credibility of newly discovered evidence.[129]

Note that the above list is restricted to cases dealing with subsections 138.530(1)(a) and (b), best described as the expanded habeas corpus sections, and do not include grounds which have been raised but not considered by the court because of res judicata or waiver. Neither does the list represent an exhaustive categorization of grounds cognizable under pre-1959 habeas corpus. Nevertheless, it should be quite apparent by now that subsections 138.530(1)(a) and (b) of Ore-

118 Tuel v. Gladden, 234 Ore. 1, 379 P.2d 553 (1963), *citing* Smallman v. Gladden, *supra* note 79.

119 Kloss v. Gladden, 233 Ore. 98, 377 P.2d 146 (1962); Syphers v. Gladden, *supra* note 113.

120 Kloss v. Gladden, *supra* note 119; Enyart v. Gladden, 233 Ore. 37, 377 P.2d 25 (1962).

121 Anderson v. Gladden, 234 Ore. 614, 383 P.2d 986 (1963), *citing* Anderson *ex rel.* Poe v. Gladden, 205 Ore. 538, 280 P.2d 823 (1955).

122 Brooks v. Gladden, 226 Ore. 191, 358 P.2d 1055 (1961).

123 Barnett v. Gladden, *supra* note 117; Tuel v. Gladden, 234 Ore. 1, 379 P.2d 553 (1963); State v. Cloran, 233 Ore. 400, 377 P.2d 911 (1963).

124 Spencer v. Gladden, 228 Ore. 522, 365 P.2d 621 (1961).

125 Freeman v. Gladden, 236 Ore. 137, 387 P.2d 360 (1963).

126 Mitchell v. Gladden, 229 Ore. 192, 366 P.2d 907 (1961).

127 Founts v. Gladden, 237 Ore. 473, 391 P.2d 629 (1964); State v. Cloran, *supra* note 123; Bryant v. State, 233 Ore. 459, 378 P.2d 951 (1963); Landreth v. Gladden, 213 Ore. 205, 324 P.2d 475 (1958); Cannon v. Gladden, 203 Ore. 629, 281 P.2d 233 (1955); Little v. Gladden, 202 Ore. 16, 273 P.2d 443 (1954).

128 Anderson v. Gladden, *supra* note 121, *citing* Garner v. Alexander, 167 Ore. 670, 120 P.2d 238 (1941).

129 Anderson v. Gladden, *supra* note 121.

gon's Post-Conviction Hearing Act exist to determine if petitioner's rights under the fourteenth amendment and the Oregon Constitution have been violated. *Brooks v. Gladden*[130] (as well as the development of habeas corpus in Oregon) leaves no doubt that what constitutes a denial of an accused's right to due process under either federal or state constitutions as a ground for relief under the act, will be determined largely by the rulings of the United States Supreme Court and Oregon's willingness to follow them.[131] Although the significance of the fact may be illusory, it is nevertheless interesting to note that the writer has been unable to find one case decided under the act in which the United States Supreme Court has granted certiorari.

3. Other Grounds

The previous discussion has centered around only the first two of the four grounds for relief provided in subsection 138.530(1). The third (the second most important ground from the petitioner's point of view) is contained in subsection (c) as follows:

> Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or the unconstitutionality of such sentence.[132]

A significant difference between subsection (c) and the expanded habeas corpus subsections (a) and (b) should be kept in mind. An action brought under (c) is an attack on the *sentence* imposed after conviction and is strictly limited to just that. Irrespective of the invalidity of the sentence, the judgment of conviction is not affected and its validity is not questioned. In *State v. Cloran*,[133] the petitioner successfully attacked his habitual criminal conviction[134] and won because the trial court had erroneously considered a federal conviction. The petitioner was remanded to the trial court for resentencing on the principal crime of perjury.[135] Petitioner made and was granted a motion for arrest of judgment on the ground the indictment failed to state

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130 *Supra* note 122.

131 Brooks v. Gladden, *supra* note 122, at 200, 358 P.2d at 1060.

Although this court's *application* of the standard of due process in a particular case may be at variance with that of the Supreme Court of the United States, the *standard itself* is the same.

132 Ore. Rev. Stat. § 138.530(1)(c) (1963).

133 *Supra* note 123.

134 An habitual criminal sentence is imposed as part of the sentence for the principal crime. Smallman v. Gladden, 206 Ore. 262, 291 P.2d 749 (1956). Being an habitual criminal is not a crime. State v. Little, 205 Ore. 659, 288 P.2d 446, *rehearing denied*, 290 P.2d 802 (1955).

135 *Ibid.*

a crime in the trial court after remand. On appeal by the State, the Supreme Court of Oregon reversed the trial court and made explicit that this section was not available to question the soundness of the judgment of conviction on any ground or to circumvent the time limit imposed upon the availability of a motion to arrest judgment. Further, on remand, the trial court could entertain no further proceedings and had no choice but to resentence the petitioner.[136]

A further significant difference between the expanded habeas corpus subsections (a) and (b) and subsection (c) centers around the important distinction between error and a denial of due process, error not being grounds for relief under the former two subsections. Some of the errors not amounting to a denial of due process were listed at the close of the discussion of subsections (a) and (b).[137] That list included the failure to file or to furnish defendant a copy of the report of psychiatric examination made after conviction but prior to sentencing,[138] or failure to hold a presentencing hearing on the psychiatric report.[139] Nevertheless, these latter two errors are grounds for relief under subsection (c).

In *Bloor v. Gladden*,[140] one of the grounds alleged by the petitioner in the trial court was a denial of his right to be furnished a copy of the psychiatric report made after he was convicted of the statutory rape of his thirteen year old daughter and given a twenty-year sentence.[141] The trial court granted relief on this issue and remanded petitioner to the convicting court for resentencing. On appeal the trial court was affirmed. Consequently, subsection (c) must be viewed as allowing the denial of some statutory procedural rights after conviction and prior to sentencing to be raised in a post-conviction hearing under the act.

This interpretation of subsection (c) is supported by the fact that the same section lists an unconstitutional sentence in addition to excessive and unauthorized sentences as one which may be attacked. A later case, *Kloss v. Gladden*,[142] at first glance would seem to weaken this

136 See also cases cited at *supra* note 127.

137 See text accompanying notes 118-129 *supra*.

138 See cases cited at *supra* note 119.

139 See cases cited at *supra* note 120.

140 227 Ore. 600, 363 P.2d 57 (1961).

141 Ore. Rev. Stat. §§ 137.111-.117 (1963) relate to sexual psychopaths and provide that after conviction of sex crime, that a psychiatric examination be given the defendant, that a report thereof be furnished him, and that a copy of the report be filed with the court. A presentencing hearing is to be then held to determine whether or not the court will impose an indeterminate life sentence.

142 *Supra* note 119.

interpretation. However, *Kloss* did not overrule *Bloor* and the facts in the two cases are almost identical. In *Kloss* the defendant was convicted of the rape of a thirteen year old girl. After conviction, however, Kloss was not given a psychiatric examination, a report thereof, or a presentencing hearing, but was immediately sentenced to a term of years. Kloss petitioned for post-conviction relief citing these errors but alleging a "substantial denial" of due process under subsection 138.530(1)(a) instead of subsection (c). The court, relying on *Townsend v. Burke*[143] for the proposition that due process requires less in post-conviction proceedings than it does in pretrial and trial proceedings, held that Kloss had suffered no denial of due process because the trial court could have imposed a greater sentence, *i.e*, indeterminate life, and the court therefore reimposed the original sentence. It would appear, since *Bloor* was not overruled by *Kloss*, the difference between the two lies in the method of pleading.[144] If the denial of rights under statutory psychiatric examination procedures are pleaded as error, instead of constitutional violations, relief may be available. However, practically speaking, a defendant would not raise this error if he could get indeterminate life instead of a definite term of years, especially since any invalidity of the sentence does not affect the conviction.

Subsection (c) provides three types of defective sentences which are vulnerable to attack under the Post-Conviction Hearing Act. The first is a sentence in excess of that authorized by statute. This is, of course, the subpart on which the recidivist relies. The second type of defective sentence is one otherwise not in accordance with law. Although most sentences which have been assailed under subsection (c) are ultimately asserted to be excessive sentences, the same cases seem to indicate that a petitioner can get to an excessive sentence through the back door.[145]

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[143] 334 U.S. 736 (1948).

[144] See Kloss v. Gladden, *supra* note 119; Enyart v. Gladden, *supra* note 120.

[145] In Mitchell v. Gladden, *supra* note 126, the trial court imposed a sentence of "a term of five years in the Oregon State Penitentiary," instead of an indeterminate period of time with a specific maximum term as required by statute. The Supreme Court of Oregon denied relief by indulging in a presumption in favor of the trial court by which it read the sentence in reverse of the reading given it by the petitioner—the specified time of five years indicated the maximum term and the indeterminate term was implied. In Bryant v. State, 233 Ore. 459, 378 P.2d 951 (1963), petitioner sought relief under this subsection because he was not sentenced until three years and ten months after his conviction. Bryant had been put on probation in lieu of sentencing, during which time he absconded. On his capture and return he was sentenced to the full five years. He unsuccessfully claimed that since he was on probation for over three years, the court was not authorized to impose the full five-year term. Indicating that an accused could attack his sentence because the prosecutor had the choice of prosecuting under either a felony or misdemeanor statute, the court in Broome v. Gladden, 231 Ore. 502, 373 P.2d

The significant differences between the subsections indicate the possibility of an attack on consecutive and concurrent sentences on grounds listed in subsection (c) since the ability of a petitioner to attack errors in his sentence under subsection (c) may not amount to a denial of due process. Although this question has not been presented to the Supreme Court of Oregon, the extended scope of post-conviction relief provided by subsection (c) would probably allow a petitioner to attack such sentences since it covers excessive and otherwise irregular sentences. Traditionally, habeas corpus was limited to an attack on the validity of the restraint. If a recidivist may attack a previous conviction for which the sentence imposed has been served,[146] it is equally probable a convict will be able to attack a concurrent or consecutive sentence even though success in such an action may not directly affect his imprisonment.[147] Notwithstanding the fact that parole or conditional pardon are available, an irregular consecutive sentence would undoubtedly adversely affect a person's chance for parole. Further, consecutive sentences are imposed under statutory authority[148] and subsection (c) specifically permits an attack on sentences not imposed in accordance with law. If a person could successfully attack a concurrent or consecutive sentence, relief is available. Section 138.520 expressly provides for modification of sentence as well as "such other relief as may be proper and just." The final ground for attacking the sentence is its unconstitutionality. Oregon's habitual criminal statutes have been assailed on this ground.[149]

611 (1962), never decided the question. Rather, the court construed the two statutes involved to be mutually exclusive and determined that petitioner had been tried under the proper statute. A case in which it is alleged the trial judge considered incompetent evidence in imposing the sentence would also be included under this category because of its error quality.

146 See text accompanying note 58 *supra*.

147 See Collins & Neil at 342.

148 Ore. Rev. Stat. § 137.120 (1963).

149 Ore. Rev. Stat. § 138.520 (1963). If we follow the logic of expanded habeas corpus, an otherwise valid sentence could become unconstitutional because the trial judge was prejudiced when imposing the sentence. This question has been presented to the Supreme Court of Oregon but not decided because the petitioner failed to sustain his burden of proof. Barber v. Gladden, 215 Ore. 129, 332 P.2d 641 (1958). However, Oregon's habitual criminal statutes have been upheld as constitutional, Hirte v. Gladden, 235 Ore. 45, 383 P.2d 993 (1963); Tuel v. Gladden, *supra* note 118. In Tuel v. Gladden, the petitioner contended his habitual criminal sentence was invalid as a result of the unconstitutionality of the habitual criminal statutes under the Oregon Constitution. The latter requires that punishment for a crime be based on reformative rather than vindictive justice. Ore. Const. art. I, § 15. Tuel argued that reformation implied eventual release from imprisonment and consequently, a life sentence without parole was not reformative but vindicative. Although implicitly agreeing with his argument, the court said the contemplated release was not to be at the substantial risk of the public. By tacking this

IV. Concepts of Finality and Fairness

A. *Res Judicata*

The rising tide of post-conviction proceedings and the inadequacy of previous common law remedies have necessitated statutory remedies such as the Oregon act. However, the availability of such remedies and the concurrent availability of federal habeas corpus have deluged the courts with petitions for post-conviction relief. Further, this situation has nearly erased any finality once attributable to the state's criminal process, virtually making the state appellate and post-conviction procedures mere steps to go through to get to the federal district courts. Recent years have seen a sharp increase in the number of habeas corpus petitions many of which were obviously frivolous. It was not until relatively recent times that Oregon applied res judicata doctrines to habeas corpus in an effort to stem the burdening increase.[150] Oregon has provided an adequately broad post-conviction remedy, sufficiently open-ended to review any claims that a petitioner may have which would be considered grounds for relief in accordance with the dictates of the Supreme Court of the United States. As *Case v. Nebraska*[151] indicated, the goal of a post-conviction statute must be to provide constitutional fairness to the criminal process. It also recognizes the need for an end, at the earliest possible stage, to the criminal process. These two goals are often difficult to accommodate. Keeping in mind the requirements of *Fay v. Noia*,[152] a look at section 138.550, Oregon's attempt to inject finality into its criminal process, is appropriate at this point.

Section 138.550 together with section 138.530 constitutes the heart of Oregon's Post-Conviction Hearing Act. The latter has furnished the requisite fairness and the former attempts to provide the finality. Section 138.550 embodies the doctrines of res judicata and waiver with a clear admonition to the courts that the means by which the criminal process is brought to an end "shall be as specified in this section and not otherwise."[153] The res judicata section of

exception on the Oregon Constitution they determined the probability of reforming a four-time loser was slight enough and the possibility of risk to the community great enough in his release to warrant life imprisonment without parole. Conviction under a statute which is vague and indefinite is also an example of grounds for relief under § 138.530(1)(d). For ground for relief previously available, see State v. Dixon, 238 Ore. 121, 393 P.2d 204 (1964). See also Daughtery v. Gladden, 217 Ore. 567, 341 P.2d 1069 (1959); Macomber v. Gladden, 216 Ore. 579, 337 P.2d 971 (1959).

150 Macomber v. Gladden, *supra* note 149; Barber v. Gladden, *supra* note 149.

151 381 U.S. 336 (1965). See text accompanying note 1 *supra*.

152 372 U.S. 391 (1963).

153 Ore. Rev. Stat. § 138.550 (1963).

Oregon's post-conviction remedy statute is extensive and comprehensive. Like habeas corpus, it had become an expanded doctrine[154] of res judicata in its more conventional form.[155] Section 138.550 bars litigation of an issue raised *and* one which could reasonably have been raised at the same time. Although as a practical matter the distinction may be meaningless, waiver implies an intentional or voluntary relinquishment of a known right suggesting an affirmative act; forfeiture implies the loss of a right, whether known or not, by failure to act or to enforce it. Whether or not justifiable, this distinction is here employed to provide a delineation between the statute's res judicata sections and the judicial doctrine of waiver.

The statute gives a petitioner one chance to raise any claims for relief he may have; the failure to take full advantage of this opportunity results in a forfeiture of his right to present additional claims for relief, with some exceptions. Oregon's statutory use of res judicata and judicial use of waiver appear to comply quite adequately with the federal standards set forth in *Henry v. Mississippi*[156] and *Fay v. Noia*.[157]

The legal machinations of an explosive burglar named Barber have played no small part in res judicata provisions of the present act. The Supreme Court of Oregon in deciding Barber's case[158] delineated the res judicata rules now incorporated in section 138.550. Relying on section 34.710 which states: "No question once finally determined upon a proceeding by habeas corpus shall be reexamined upon another proceeding of the same kind," the court decided res judicata applied to habeas corpus. Then the court defined res judicata as meaning that a denial of an application for habeas corpus relief was to act as a bar to subsequent applications upon grounds which *were* alleged as well as grounds which *could have been alleged* in the first application. The court did not stop there, however. Seizing upon a provision in the Uniform Post-Conviction Procedure Act,[159] it engrafted an exception to this expression of res judicata. The exception provided that any ground alleged which could not reasonably have been raised in the prior proceeding would not be barred from consideration by res judicata if the petitioner could establish in fact that it could not reasonably have been raised.

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154 Barber v. Gladden, *supra* note 149.

155 *Ibid.*

156 379 U.S. 443 (1965).

157 372 U.S. 391 (1963).

158 Barber v. Gladden, 215 Ore. 129, 332 P.2d 641 (1958).

159 Uniform Post-Conviction Procedure Act § 8.

Subsection 138.550(1) states that the failure of a defendant to have sought appellate review of his conviction or to have raised *matters alleged in his petition* at his trial does not affect the *availability* of relief under the act. Constitutional errors and irregularities in the sentence are not forfeited by the failure to object and preserve the constitutional error or to take a direct appeal from the conviction. Several habeas corpus cases prior to 1959 had held that failure to appeal or failure to raise an issue on appeal precluded any post-conviction relief.[160] In all of these cases, however, the court went on to decide them on their merits. The cases invariably presented matters of constitutional dimensions. When the petitioner's claims were meritorious his failure to appeal was not mentioned[161] or the questions were of "great public importance."[162] The failure of the Supreme Court of Oregon to apply res judicata strictly was acknowledgment that to do so would preclude almost every application for post-conviction relief under Oregon's expanded habeas corpus, no matter how meritorious. In view of what the court actually did in these cases, the rule must be taken to mean that nonconstitutional errors not raised or appealed are "waived" even though they may be reversible error. This view is consistent with the rule that habeas corpus is not a substitute for appeal or delayed appeal.[163]

The res judicata sections must be read as referring only to constitutional errors or errors in sentencing under subsection 138.530(1)(c) of the Oregon Revised Statutes. In fact the reference in subsection (1) to "matters alleged in this petition" implicitly relates to the grounds for relief listed in section 138.530.[164]

There is, however, a situation in which error will be reviewed by

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160 Landreth v. Gladden, 213 Ore. 205, 324 P.2d 475 (1958); Barber v. Gladden, 210 Ore. 46, 309 P.2d 192 (1957); Alexander v. Gladden, 205 Ore. 375, 288 P.2d 219 (1955); Blount v. Gladden, 203 Ore. 487, 280 P.2d 414 (1955).

161 Landreth v. Gladden, *supra* note 160.

162 Anderson v. Britton, 212 Ore. 1, 318 P.2d 291 (1957).

163 Compare with a similar rule applied by the courts on direct appeal to the effect that errors not raised in the trial court cannot be considered on appeal. State v. Dayton, — Ore. —, 409 P.2d 189 (1965); State v. Williams, — Ore. —, 408 P.2d 936 (1965).

164 See Parker v. Gladden, — Ore. —, 407 P.2d 246, 247 (1965), which states:

> The grounds for post-conviction relief are limited. Error at the trial, even though it be considered reversible, prejudicial, or materially affecting the rights of the party, is not necessarily a sufficient basis upon which to grant post-conviction relief. Post-conviction is not a delayed appeal. The basic purpose of the Act was not to enlarge the grounds for post-conviction relief; it was to end the confusion over which of the common-law writs was the proper vehicle to seek relief by providing a single exclusive remedy.

See also State v. Cloran, *supra* note 123; Brooks v. Gladden, *supra* note 122.

the court in a post-conviction proceeding when no appeal was taken. In *Bevel v. Gladden*[165] the petitioner alleged a denial of his constitutional rights under the equal protection clause of the fourteenth amendment in that he was denied his statutory right of direct appeal because he could not afford to procure a transcript of his trial. In response to *Griffin v. Illinois*[166] the court was forced to grant relief. Since the transcript was before it, the court simply proceeded to review it as if the proceeding were a direct and timely appeal and considered both error and constitutional irregularities. Practically speaking, of course, this amounted to delayed appeal. No doubt this procedure will be strictly limited in the future to just such a situation, but it is nevertheless justified under the act permitting courts to "grant such other relief as may be proper and just."[167]

Subsection 138.550(1) reiterates the exhaustion requirement which bars post-conviction relief while direct appeal, a motion for new trial, or a motion in arrest of judgment are still *available*. This exhaustion requirement is similar to that required in federal habeas corpus as interpreted by *Fay v. Noia*.[168] Failure to take advantage of these post-conviction procedures does not bar post-conviction relief.[169]

The remaining res judicata sections substantially adopt the doctrine of *Barber v. Gladden*[170] with some ameliorating exceptions. A rule different than that of subsection (1) applies under subsection (2) when the petitioner has taken a direct appeal from his conviction. If an appeal has been taken, subsection (2) bars an application for relief under the act when the grounds were or could reasonably have been raised.[171] Subsection (3) similarly applies res judicata to a prior proceeding under the act and subsection (4) similarly applies it to post-conviction proceedings instituted prior to the effective date of the act, *i.e.*, habeas corpus, coram nobis, and motions to correct the record or to vacate the judgment. The statute does not give any guide for determining when a ground could reasonably have been asserted in a prior proceeding. *Barber v. Gladden*[172] does, however, indicate the

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165 232 Ore. 578, 583-85, 376 P.2d 117, 119-20 (1962).

166 351 U.S. 12 (1956).

167 Ore. Rev. Stat. § 138.520 (1963).

168 372 U.S. 391 (1963).

169 Barnett v. Gladden, 237 Ore. 76, 390 P.2d 614 (1964); Brooks v. Gladden, *supra* note 122.

170 215 Ore. 129, 332 P.2d 641 (1958).

171 See, *e.g.*, Benson v. Gladden, — Ore. —, 407 P.2d 634 (1965). The Oregon court made an exception to this rule in Anderson v. Gladden, 234 Ore. 614, 383 P.2d 986 (1963), because the issues were of "great public importance."

172 *Supra* note 170.

court is not about to suggest situations in which res judicata will not bar an application for relief because the ground could not reasonably have been raised in a prior proceeding. Instead, the court simply states that it is up to the petitioner to establish that the grounds asserted could not have reasonably been assigned on appeal or asserted in a prior post-conviction proceeding.[173]

In addition to the exception announced in *Barber v. Gladden*,[174] and embodied in the present act, section 138.550 provides an additional exception to the application of res judicata if the petitioner alleges a ground for relief under the act which was not specifically decided by the court on a prior appeal or prior post-conviction proceeding and the petitioner was not represented by counsel.[175] If the court previously

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[173] Jensen v. Gladden, 233 Ore. 439, 378 P.2d 950 (1963); Poe v. Gladden, 233 Ore. 324, 378 P.2d 276 (1963). If the Oregon court has not elaborated on the exception up to this point, the federal district courts have. In Macomber v. Gladden, 304 F.2d 487 (9th Cir. 1962), a dismissal of the habeas corpus was affirmed because petitioner had failed to exhaust his state remedies. Petitioner had applied for habeas corpus, in the state courts three different times. However, the first two petitions were presented prior to Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87, *rehearing denied*, 253 P.2d 289 (1953), when habeas corpus relief was strictly limited to person or subject matter jurisdiction questions. The grounds alleged in the district court could not have reasonably been asserted at that time since they were not claims which went to these questions. Macomber's third habeas corpus petition in the state courts was denied because of res judicata of the first two. The federal district court saw this as a situation in which the ground presently asserted could not reasonably have been asserted in any prior proceeding. It was not until 1964 that the Supreme Court of Oregon provided an example of this exception to res judicata in Freeman v. Gladden, 239 Ore. 144, 396 P.2d 779 (1964). The court had previously denied relief in a post-conviction proceeding, Freeman v. Gladden, 236 Ore. 137, 138-39, 387 P.2d 360, 361 (1963), because the grounds set forth in the petition had been asserted on direct appeal from the conviction. Petitioner's conviction was affirmed in State v. Freeman, 232 Ore. 267, 374 P.2d 453 (1962); *cert. denied*, 373 U.S. 919, *rehearing denied*, 374 U.S. 858 (1963). Petitioner had asserted that her constitutional rights had been violated by a denial of counsel during an intense interrogation before arraignment during which she made statements incriminating herself. In the present case, the court reconsidered petitioner's allegation of denial of counsel on a motion to recall the mandate entered in the first post-conviction proceeding in light of Escobedo v. Illinois, 378 U.S. 478 (1964), decided after its mandate had issued. Although the court decided that the merits did not warrant application of *Escobedo*, it is nevertheless an example of a situation in which the ground, although asserted previously, could not reasonably have been asserted on the same basis as it could after *Escobedo*. Delaney v. Gladden, 237 F. Supp. 1010 (D. Ore. 1965) was a similar case. Petitioner had alleged a denial of counsel during the interrogation and since his previous petitions for post-conviction relief in the state courts were before *Escobedo*, the district court decided this ground could not have reasonably been raised and consequently dismissed for failure to exhaust the available state court remedies.

[174] 228 Ore. 140, 363 P.2d 771 (1961).

[175] Hirte v. Gladden, 235 Ore. 45, 383 P.2d 993 (1963); Delaney v. Gladden, 232 Ore. 306, 374 P.2d 746 (1962); Barber v. Gladden, *supra* note 174.

determined the question on the merits, whether or not the petitioner had counsel is irrelevant. It is only when petitioner had no counsel in the prior proceeding and the ground alleged was not specifically decided by the court.

The fact that subsection 138.550(4) applies res judicata to previous post-conviction proceedings prior to 1959 anticipates other problems which were implicit in the confusion of remedies then available. Although petitioner had previously raised and the court had adversely decided a ground for relief now raisable under the act, such ground could be raised once again under the act, if the prior adverse decision was based on the fact that "no remedy heretofore existing allowed relief upon the ground alleged."[176] Hope has been expressed that the courts will give this exception a liberal interpretation so as to cover the situation in which the petitioner simply chose the wrong remedy.[177]

One further exception to the application of res judicata to post-conviction proceedings prior to 1959 under subsection (4) permits a petitioner to bring an action under the act if an adverse decision in a prior post-conviction proceeding rested upon petitioner's inability to sustain his burden of proof without contradicting the record of the trial court. Such had not been possible in a habeas corpus action.[178] It is here appropriate to mention that section 138.630 provides for contradiction of the record. However, it will be remembered that in habeas corpus there is an irrebuttable presumption of the veracity of the record which can not be directly contradicted.[179] This section did

[176] Ore. Rev. Stat. § 138.550(4) (1963).

[177] Collins & Neil at 341-43. Although the Supreme Court of Oregon has never decided this question, the federal courts have. In Alcorn v. Gladden, 286 F.2d 689 (9th Cir. 1961), the court of appeals affirmed the district court's order remanding the petitioner to his state remedies because of his failure to exhaust them. Petitioner had alleged a denial of counsel and the entry of a coerced guilty plea in an application for relief by way of coram nobis. Coram nobis was not the appropriate remedy for relief on these grounds because they were cognizable on habeas corpus. Consequently, relief was denied in the Oregon courts not because petitioner had no remedy at all but because he chose the wrong one. In remanding petitioner to his state remedies, the district court and the court of appeals implicitly interpreted subsection (4) to encompass such a situation even though a strict reading of that subsection would not so indicate. It no doubt may be safely assumed that the Supreme Court of Oregon will do the same should the question ever be presented. As a matter of fact, Alcorn subsequently filed a petition under the act alleging the same grounds for relief which he had alleged in federal court and was heard on the merits. Alcorn v. Gladden, 237 Ore. 106, 111-12, 390 P.2d 625, 628 (1964). This can be taken as an implicit approval of the interpretation imposed on this exception by the federal courts.

[178] See text accompanying note 16 *supra*.

[179] Huffman v. Alexander, 197 Ore. 283, 251 P.2d 87 (1952), *rehearing denied*, 253 P.2d 289 (1953). Note, however, that evidence tending to invalidate, but not directly contradicting, recitals in the record can be introduced.

not completely wipe out the presumption. *Womack v. Kremen*,[180] denied relief because petitioner had not sustained his burden of proof[181] which the court made greater by imposing a presumption of the truth of the facts recited in the trial record. Although subsection 138.620(2) requires proof of petitioner's allegations by a preponderance of the evidence and section 138.630 says nothing of any presumption in favor of the trial record, the court retained the presumption with the result that the act simply changed the presumption from being absolute to rebuttable. The effect of this presumption is to impose a greater burden of proof when the issue raised is one of fact as opposed to one of law. However, compared to pre-1959 habeas corpus, the Post-Conviction Hearing Act does permit an issue of fact to be raised if not otherwise precluded by the res judicata provisions.

B. *Waiver*

The real scope of the Post-Conviction Hearing Act cannot be appreciated without a look at Oregon's judicial doctrine of waiver. It is therefor appropriate to discuss this doctrine as an adjunct to the res judicata provisions. Again, it is well to keep in mind the implicit federal requirements that a strict employment of waiver in favor of the petitioner is greatly favored and that any waiver of a constitutional right must be an intelligent, understanding, and intentional relinquishment of a known right.[182]

Oregon's use of waiver is best seen through cases involving guilty pleas, a subject on which the post-conviction remedy statute is silent. A conviction on a plea of guilty may be assaulted in a post-conviction proceeding under the act.[183] *Huffman v. Alexander*[184] held that habeas corpus prior to 1959 was available to attack a guilty plea even though such an attack was strictly limited because of the rule against contradicting the record. This limitation is greatly eased under the statute but not completely erased. A guilty plea is a judicial confession which waives all defenses and objections both in the nature of error and of a constitutional dimension.[185] In *Huffman* it was recognized that for a waiver to be valid,

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180 234 Ore. 170, 173, 380 P.2d 815, 816 (1963).

181 Ore. Rev. Stat. § 138.620(2) (1963).

182 Johnson v. Zerbst, 304 U.S. 458 (1937).

183 Alcorn v. Gladden, 237 Ore. 106, 116-19, 390 P.2d 625, 630-32 (1965).

184 197 Ore. 283, 251 P.2d 87, *rehearing denied*, 253 P.2d 289 (1953).

185 Huffman v. Alexander, *supra* note 184, at 298, 251 P.2d at 93-94. See also McWilliams v. Gladden, — Ore. —, 407 P.2d 833 (1965), where the court stated a defendant's effective waiver must be based on a mental capacity of a defendant to understand his rights and the meaning of waiver fully and that the choice must be free and voluntary.

> it must be voluntary and must be understandingly made with knowledge by the party of his rights. In this connection the age, education, experience, mental capacity, the nature of the charge, whether complicated or simple, the possible defenses available and other relevant circumstances will be considered if the case be taken to federal court and should be considered in the state court if conflicts and intolerable delays are to be avoided.[186]

This case also states that a hearing should be held by the trial court relative to the validity of the guilty plea.[187] This standard of waiver and the necessity to hold an evidentiary hearing complies adequately with the federal constitutional standards. However, statement of the standard and its application are two different matters. Most cases decided under the Post-Conviction Hearing Act involving waiver questions acknowledge that any waiver must be made understandingly and intentionally with a knowledge of rights available. However there appears to be no case since *Huffman* reciting what is to be considered in determining if the waiver was intelligently and understandingly made. Since no lower state court decisions are reported in Oregon, it is difficult to be sure just what the lower courts considered, and the Supreme Court of Oregon does not very often elaborate upon what facts appear in the record before it. Assuming the indices of an intelligent and knowing waiver listed in *Huffman* are still the guide, Oregon cases involving waiver pose some problems. Are the standards of *Huffman* being used? Are the standards less strict when the petitioner had been represented by counsel at his trial? Is the burden upon the petitioner or the respondent in a post-conviction proceeding involving waiver and what problem does *Townsend v. Sain* pose,[188] if any?

In light of *Gideon v. Wainwright*,[189] *Townsend v. Sain*,[190] and

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[186] Huffman v. Alexander, *supra* note 184, at 322, 251 P.2d at 104.

[187] Ore. Rev. Stat. § 138.620 (1963) provides for a mandatory evidentiary hearing.

[188] 372 U.S. 293 (1963). In Admire v. Gladden, 227 Ore. 370, 362 P.2d 380 (1961), the petitioner had confessed to statutory rape while in the county jail on another charge. Thereafter, an arrest warrant was issued and a preliminary hearing held. At the hearing the record merely reflected that petitioner had been advised of the nature of the charge, that he declined appointment of counsel and that he entered a guilty plea. The record did not show that advice as to the right to counsel or the meaning of a guilty plea was given. The psychiatric report subsequently filed showed that petitioner was 31 years old, white, male of low average intelligence with a poor work record, and was divorced. He had been given a medical discharge from the army, suffered from alcoholism, was emotionally immature and irresponsible, and had had previous difficulty with the law. Post-conviction relief was denied because petitioner failed to sustain his burden of proof that he had been denied his right to counsel, that there was no effective waiver of indictment, and that his guilty plea was involuntary. There was nothing in the record to indicate that he had not understood the trial proceedings or was not fully advised

Case v. Nebraska,[191] it would seem that the trial record should affirmatively show that any waiver is the result of an intelligent and voluntary relinquishment of the right in question and that the burden of showing the same is upon the state. If the record does not affirmatively support petitioner's allegations, it should be presumed that he was properly advised and that the waiver was valid. Again, if this is true, it is another reason why the effectiveness of the statute in providing finality and fairness to the state criminal process may be weakened by the Oregon judiciary.[192]

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of his rights or that he did not act in accordance with his own best judgment. Bloor v. Gladden, 227 Ore. 600, 363 P.2d 57 (1961), was almost an exact replica of *Admire* although we do not know what the psychiatric report contained. Post-conviction relief was also denied in this case, but in *Bloor* the Supreme Court of Oregon did not have the trial judge's findings of fact to determine upon what basis the trial court had found that petitioner had not maintained his burden of proof. Both of these cases throw serious doubt upon whether or not the Oregon courts are following the standards announced in *Huffman*. Alcorn v. Gladden, 237 Ore. 106, 113-15, 390 P.2d 625, 629-30 (1964), involved an allegation of denial of counsel. At the post-conviction hearing the trial judge testified he had advised the defendant of his right to counsel and had offered to appoint one. Relief was denied because petitioner was deemed to have waived counsel but nothing was said relevant to whether or not the waiver was an intelligent and understanding waiver. It appears the trial court's finding of an understanding waiver was based on the fact the trial judge had advised petitioner of his right to counsel and had offered to appoint one. Whether the waiver standards of *Huffman* are being applied cannot be definitely answered on the basis of these cases. If *Huffman* is not being applied, it could very well mean that the fairness and finality of an adequate post-conviction remedy statute will be weakened by the improper use of a waiver doctrine.

In Barber v. Gladden, 228 Ore. 140, 142-43, 363 P.2d 771, 773 (1961), petitioner alleged that the trial judge was prejudiced in passing sentence after a plea of guilty. Because petitioner was represented by counsel, no objection to the evidence was made, and neither the petitioner nor his attorney made a request for the trial court to consider evidence in extenuation or mitigation of the sentence. Petitioner was deemed to have waived any possible prejudice of the judge. It does not appear that most of the requirements of an understanding waiver were even thought of let alone considered. In the recent case of Rose v. Gladden,—Ore.—, 405 P.2d 543 (1965), petitioner alleged that his plea of guilty was an unintelligent plea because he thought he was pleading to a misdemeanor instead of a felony. The court denied relief because there was nothing in the record to support this contention and because petitioner was represented by counsel at the time. Although scant evidence thereof, these two cases indicate that presence of counsel may supply the basis for presuming that the petitioner understandingly and knowingly waived his rights.

189 372 U.S. 335 (1963).

190 372 U.S. 293 (1963).

191 381 U.S. 336 (1965).

192 State v. Turner,—Ore.—, —, 404 P.2d 187, 188 (1965), shows that the Oregon courts may be reversing a possible trend toward too lax an application of the waiver doctrine. That case held it necessary for the police to inform an accused of his right to remain silent and his right to counsel and that the burden of showing the effectiveness

Waiver for failure to appeal does not bar application for relief under the act. However, failure to appeal may be deemed a waiver of the constitutional claims asserted in a petition under the act.[193] But any such waiver must be intelligently and understandingly made.

CONCLUSION

Unquestionably, Oregon's experience with post-conviction remedies, both prior and subsequent to the enactment of its new statute, should prove valuable to the Ohio bar in anticipating and interpreting problems that will arise under Ohio's Post-Conviction Remedy Act. It is clear that the Ohio act, like Oregon's, will have to be construed in light of the minimum due process requirements established by the Supreme Court of the United States, notwithstanding the countervailing demands for finality. The problems which the Ohio courts will face should not be unlike those that have arisen under Oregon's act. Hence, it should be helpful to look to the Oregon decisions, as well as to decisions in other states having similar statutes, in order to find the bases for future Ohio court interpretations. The Supreme Court of the United States has laid down certain guidelines that must be adhered to; as long as the states meet these standards they will be allowed to dictate their own approaches to the ever-increasing demand for post-conviction relief.

William A. Greene

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of the advice was upon the state. Further, *Turner* imposed a duty on the trial court to hear evidence and make findings of fact on the question of whether or not an accused was effectively advised of his rights. See also State v. Neely, 239 Ore. 487, 395 P.2d 557, *modified and remanded*, 398 P.2d 482 (1965). State v. Ervin,—Ore.—, 406 P.2d 901 (1965), even though a case involving direct appeal, gives further hope. The court stated the defendant must be advised of his rights by the police and an understanding waiver must appear on the record. McWilliams v. Gladden,—Ore.—, 407 P.2d 833 (1965), is to the same effect and was decided under the act.

[193] Richardson v. Williard,—Ore.—, 406 P.2d 156 (1965).