AMICUS CURIAE BRIEF

INDEX

INDEX OF CASES AND AUTHORITIES

No. 155

In the Supreme Court of the United States

OCTOBER TERM, 1962

CLARENCE EARL GIDEON,

Petitioner,

vs.

H. G. COCHRAN, JR., Director, Division of Corrections,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF FOR THE STATE OF OREGON AS AMICUS CURIAE

AMICUS CURIAE BRIEF

STATEMENT

Pursuant to order of this Court entered in this case on June 4, 1962, counsel are requested to discuss the following question:

> " ' "Should this Court's holding in *Betts v. Brady*, 316 U.S. 455, be reconsidered?" ' "

Under Rule 27, and after specific suggestion of counsel for respondent, this brief of the State of Oregon, sponsored by its Attorney General, is submitted amicus

curiae. The sole purpose of this brief is to present to the Supreme Court the possibly unique preliminary findings and conclusions drawn from this state's experience under its recent Post-Conviction Relief Act [Oregon Laws 1959, chapter 636, Oregon Revised Statutes §§ 138.510–138.680 and 34.300 (1959)].[1] It is not our intent to state final conclusions on whether the Sixth Amendment of the United States Constitution is or is not applicable to practice and procedure in the various states under the Fourteenth Amendment to the United States Constitution. Nor do we urge a position on whether requirements of the Fourteenth Amendment require counsel in every felony case.

OBSERVATIONS CONCERNING OREGON'S POST-CONVICTION RELIEF ACT

Effective May 26, 1959, the Oregon State Legislature passed a Post-Conviction Relief Act to allow "some clearly defined method by which [state prisoners] may raise claims of denial of federal rights."[2] In specific reference to right to counsel problems, as met by the Oregon Post-Conviction Relief Act, a committee of the Judicial Council of the State of Oregon, in a report signed

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[1] Reprinted in Appendix A.

[2] *Young v. Ragen,* 337 US 235, 239 (1948) as quoted in an article on the "Oregon Postconviction-Hearing Act", 39 Oregon Law Review 337, June 1960.

by five leading Oregon judges,[3] concluded that "the best answer to the problem would be to appoint an attorney in every felony case whether the defendant wants it or not."[4] In a preliminary discussion of the Post-Conviction Relief Act, this committee commented that "a major area of concern must be the cost of these proceedings." In an addenda to the report, the committee attached a partial cost calculation showing a cost to the various counties of the state of $38,000, for the first 20 months' period of the program.

The office of the Attorney General estimated that the total cost of the Post-Conviction Relief program exceeds $100,000 a year.[5a] In a summary, Charles A. Sprague, former Governor of the State of Oregon, in his column "It Seems to Me" stated that:

> "This new law which opens up the way for trials of cases means heavy additional costs to the state. It invites every man who enters the penitentiary to become a jailhouse lawyer, seeking some angle on which he can hang a plea for a fresh hearing. And after the hearing, of course, he still has the right of appeal to the Supreme Court. The procedure consumes time of courts, of the Attorney General's office, which has the responsibility in this connection,

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[3] Oregon Supreme Court Justice Gordon W. Sloan and Circuit Judges Alan F. Davis, George A. Jones, Val D. Sloper and Lyle R. Wolff.

[4] Report of Judicial Council Committee on Arraignment, Procedure and Waiver of Rights to the Oregon Judicial Council, 1962.

[5a] Oregon Statesman, January 19, 1962.

and of local authorities who will be called on for aid or evidence."[5b]

The case of *Bloor v. Gladden,* 227 Or 600, 363 P2d 57 (1961), as supplemented by the case of *State v. Bloor,* 229 Or 49, 365 P2d 103, 365 P2d 1075, is the leading case on right to counsel, as tested in an Oregon post-conviction hearing. That case upheld the action of an Oregon circuit court judge in not furnishing counsel to an accused, who was considered to have waived such right.

Also, in a currently unpublished United States District Court opinion, Judge East of the United States District Court for the District of Oregon (*Cannon v. Gladden,* Case No. 61-282, March 28, 1962) upheld the validity of another Oregon case in which the court, in rather extreme circumstances, accepted the waiver of counsel by an accused.[6]

Thus, Oregon's Post-Conviction Relief Act has not materially changed the legal pattern previously set, so far as the question of right to counsel and the waiver thereof are concerned.

Some recent statistics, drawn from the first three years of the Post-Conviction Relief Act (the three years from June 1, 1959 to June 1, 1962) are applicable to the question of availability of counsel. Of 175[7a] Post-Convic-

[5b] Oregon Statesman, February 28, 1962.
[6] Opinion reported in Appendix B.
[7a] Excluding some special cases not pertinent here.

tion Relief Act cases terminated in that period, 20[7b] were found to contain substantial defect in conviction or sentence requiring relief to be afforded.[8] In 15 of these cases, no attorney had represented the accused at the time the defect occurred.

Eight of these 20 substantial defect cases resulted in a final release from Oregon custody. In every such instance of final release, there had been no attorney at the crucial point in the original criminal proceeding.

In each of the five substantial defect cases in which an attorney represented the defendant, the defect was in the sentence, not in the conviction. Thus, in none of these five cases did the defect lead to a final release. In four of the five, a resentence has already been effected, and in the fifth a resentence is considered to be pending, the defendant serving several concurrent sentences.

While these statistics are certainly not conclusive, and it is clear that further analysis in depth would be required to fully utilize the experimental and information values of the past three years' experience in the Post-Conviction Relief Act, it may nevertheless be concluded that the money so expended would better have been expended in pressing counsel on all defendants, whether desired or not.

[7b] Excluding some special cases not pertinent here.

[8] Cases listed in Appendix C.

CONCLUSION

The conclusion expressed in this brief is simply that the experience of the State of Oregon tends to indicate that it would provide greater protection of constitutional rights, and would be less expensive, to insist upon counsel in each original criminal proceeding; than to attempt by a post-conviction proceeding to recover justice, lost by defects at the trial.

Respectfully submitted,

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Amicus Curiae

APPENDIX A

Oregon Revised Statutes 138.510 to 138.680

POST-CONVICTION RELIEF ACT

138.510 Convicted person may file petition for relief. (1) Except as otherwise provided in ORS 138.540, any person convicted of a crime under the laws of this state may file a petition for post-conviction relief pursuant to ORS 138.510 to 138.680.

(2) A petition pursuant to ORS 138.510 to 138.680 may be filed without limit in time.

(3) The remedy created by ORS 138.510 to 138.680 is available to persons convicted before May 26, 1959.

(4) In any post-conviction proceeding pending in the courts of this state on May 26, 1959, the person seeking relief in such proceedings shall be allowed to amend his action and seek relief under ORS 138.510 to 138.680. If such person does not choose to amend his action in this manner, the law existing prior to May 26, 1959, shall govern his case.

[1959 c.636 §§1, 17, 16]

138.520 Relief which court may grant. The relief which a court may grant or order under ORS 138.510 to 138.680 shall include release, new trial, modification of sentence, and such other relief as may be proper and just. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody and bail.

[1959 c.636 §2]

138.530 When relief must be granted; executive

clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court

in habeas corpus as provided in the Constitution of this state.

[1959 c.636 §3, 5]

138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies. (1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of his restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as

otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed.
[1959 c.636 §4]

138.550 Availability of relief as affected by prior judicial proceedings. The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in his petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of his conviction, or to have raised matters alleged in his petition at his trial, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of his conviction, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of his conviction and sentence, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to his lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not spe-

cifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in his original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in

the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in his conviction and sentence.
[1959 c.636 §15]

138.560 Procedure upon filing petition for relief; venue and transfer of proceedings. (1) A proceeding for post-conviction relief pursuant to ORS 138.510 to 138.680 shall be commenced by filing a petition and two copies thereof with the clerk of the circuit court for the county in which the petitioner is imprisoned or, if the petitioner is not imprisoned, with the clerk of the circuit court for the county in which his conviction and sentence was rendered. The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by petitioner on the defendant, but, in lieu thereof, the clerk of the court in which the petition is filed shall immediately forward by registered mail a copy of the petition to the Attorney General or other attorney for the defendant named in ORS 138.570.

(2) For the purposes of ORS 138.510 to 138.680, a person released on parole or conditional pardon shall be deemed to be imprisoned in the institution from which he is so released.

(3) Except when petitioner's conviction was for a

misdemeanor, the release of the petitioner from imprisonment during the pendency of proceedings instituted by him pursuant to ORS 138.510 to 138.680 shall not cause the proceedings to become moot. Such release of petitioner shall not change the venue of the proceedings out of the circuit court in which they were commenced and shall not affect the power of such court to transfer the proceedings as provided in subsection (4) of this section.

(4) Whenever petitioner is imprisoned in the Oregon State Penitentiary or the Oregon State Correctional Institution and the circuit court for Marion County finds that the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced, the circuit court for Marion County upon its own motion or the motion of a party may order the petitioner's case to be transferred to the circuit court for the county in which petitioner's conviction and sentence were rendered. Such an order shall not be reviewable by any court of this state.
[1959 c.636 §6]

138.570 Defendant and counsel for defendant. If the petitioner is imprisoned, the petition shall name as defendant the official charged with the confinement of petitioner. If the petitioner is not imprisoned, the defendant shall be the State of Oregon. Whenever the defendant is the Warden of the Oregon State Penitentiary or the Superintendent of the Oregon State Correctional Institution, the Attorney General shall act as his attorney in the proceedings. Whenever the defendant is some other

official charged with the confinement of petitioner, the district attorney of the county wherein the petitioner is imprisoned shall be the attorney for the defendant. Whenever petitioner is not imprisoned, counsel for the State of Oregon as defendant shall be the district attorney of the county in which petitioner's conviction and sentence were rendered. Whenever the petitioner is released from imprisonment during the pendency of any proceedings pursuant to ORS 138.510 to 138.680, the State of Oregon shall be substituted as defendant. Upon such substitution, counsel for the original defendant shall continue to serve as counsel for the substituted defendant.

[1959 c.636 §7]

138.580 Petition. The petition shall be verified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The Supreme Court, by rule, may prescribe the form of such verification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief

desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be verified as heretofore provided in this section. Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition, or the petition shall state why they are not attached. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law.
[1959 c.636 §8]

138.590 Petitioner may proceed as poor person. (1) Any petitioner who is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding may proceed as a poor person pursuant to this section upon order of the circuit court in which the petition is filed.

(2) If the petitioner wishes to proceed as a poor person, he shall file with his petition an affidavit stating that he is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding. The affidavit shall contain a brief statement of petitioner's assets and liabilities and his income during the previous year. If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ counsel, it shall order that petitioner proceed as a poor person. However, when the circuit court for Marion County orders petitioner's case transferred to another circuit court as provided in subsection (4) of

ORS 138.560, the matter of petitioner's proceeding as a poor person shall be determined by the latter court.

(3) In the order to proceed as a poor person, the circuit court shall appoint counsel to represent petitioner. Counsel so appointed shall represent petitioner throughout the proceedings in the circuit court.

(4) If counsel appointed by the circuit court determines that the petition as filed by petitioner is defective, either in form or in substance, or both, he may move to amend the petition within 15 days following his appointment, or within such further period as the court may allow. Such amendment shall be permitted as of right at any time during this period. If appointed counsel believes that the original petition cannot be construed to state a ground for relief under ORS 138.510 to 138.680, and cannot be amended to state such a ground, he shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of his belief by filing an affidavit stating his belief and his reasons therefor with the clerk of the circuit court. This affidavit shall not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the circuit court may consider such affidavit in deciding upon the sufficiency of the petition at the hearing.

(5) When a petitioner has been ordered to proceed as a poor person, the expenses which are necessary for the proceedings upon his petition in the circuit court and the award to appointed counsel for petitioner as provided in this subsection shall be a charge against and shall be paid by the county in which petitioner's conviction and

sentence were rendered. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the circuit court shall determine the amount of expenses of petitioner in the circuit court. The circuit court may also determine a reasonable fee for the services of appointed counsel in the proceedings in the circuit court. The expenses and fee determined by the circuit court shall be certified to and shall be ordered to be paid by the county in which petitioner's conviction and sentence were rendered and shall be paid by such county.

(6) When petitioner has been ordered to proceed as a poor person, all court fees in the circuit court are waived.

[1959 c.636 §9; 1961 c.480 §3]

138.600 Filing fee and undertaking not required. Notwithstanding any other fees provided by law, there shall be no filing fee or undertaking required in any court for a proceeding pursuant to ORS 138.510 to 138.680.

[1959 c.636 §10]

138.610 Pleadings. Within 30 days after the docketing of the petition, or within any further time the court may fix, the defendant shall respond by demurrer, answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to the amendment of the petition or any other pleading, or as to the filing of further pleadings, or as to extending

the time of the filing of any pleading other than the original petition.

138.620 Hearing. (1) After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely issues of law, the circuit court need not order that petitioner be present at such hearing, so long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present.

(2) If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence.
[1959 c.636 §12]

138.630 Evidence of events occurring at trial of petitioner. In a proceeding pursuant to ORS 138.510 to 138.680, events occurring at the trial of petitioner may be shown by a duly authenticated transcript, record or portion thereof. If such transcript or record cannot be produced, the affidavit of the judge who presided at the trial setting forth the facts occurring at the trial shall be admissible in evidence when relevant. When necessary to establish any ground for relief specified in ORS 138.530, the petitioner may allege and prove matters in contradiction of the record of his trial. When the record

is so contradicted, the defendant may introduce in evidence any evidence which was admitted in evidence at the trial to support the contradicted matter and may call witnesses whose testimony at such trial supported the contradicted matter. Whenever such evidence or such witnesses cannot be produced by defendant for any reason which is sufficient in the opinion of the court, such parts of the duly authenticated record of the trial as support the contradicted matter may be introduced in evidence by the defendant. A duly authenticated record of the testimony of any witness at the trial may be introduced in evidence to impeach the credibility of any testimony by the same witness in the hearing upon the petition.
[1959 c.636 §13]

138.640 Judgment. After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.
[1959 c.636 §14]

138.650 Appeal. Either the petitioner or the defendant may appeal to the Supreme Court of Oregon within 60 days after the entry of final judgment on a petition

pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that the court may provide that the bill of exception contain only such evidence as may be material to the decision of the appeal.
[1959 c.636 §18]

138.660 Dismissal of appeal. In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Supreme Court on its own motion or on motion of respondent may, at any time after all papers and documents necessary or required by law for full appellate review have been filed with the clerk of the Supreme Court, dismiss the appeal without oral argument or submission of briefs if it finds that no substantial question of law is presented by the appeal. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal.
[1959 c.636 §19]

138.670 Admissibility, at new trial, of testimony of witness at first trial. In the event that a new trial is ordered as the relief granted in a proceeding pursuant to ORS 138.510 to 138.680, a properly authenticated transcript of testimony in the first trial may be introduced in evidence to supply the testimony of any witness at the first trial who has since died or who cannot be produced at the new trial for other sufficient cause. Such transcript shall not be admissible in any other respect, except that the transcript of testimony of a witness at the first

trial may be used at the new trial to impeach the testimony at the new trial by the same witness.
[1959 c.636 §20]

138.680 Short title. ORS 138.510 to 138.680 may be cited as the Post-Conviction Hearing Act.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN CALVIN CANNON, Petitioner, v. CLARENCE T. GLADDEN, Warden of the Oregon State Penitentiary, Respondent.	No. 61-282 OPINION March 28, 1962

EAST, District Judge.

The petitioner seeks a writ of habeas corpus commanding his release from custody by the respondent, pursuant to the judgment of sentence dated April 27, 1954, later referred to.

On January 21, 1954, petitioner was convicted of the crime of rape upon a girl of the age of 14 years, and on that date the Circuit Court of the State of Oregon for Deschutes County sentenced the petitioner to serve not to exceed 20 years in the Oregon State Penitentiary. Thereafter, on January 25, 1954, the same court set aside the judgment of conviction and requested the Superintendent of the Oregon State Hospital to appoint a psychiatrist to examine the petitioner and report to the court, all as provided and in compliance with ORS §§ 137.112 and 137.113. Thereafter, such appointment

and examination was made and the psychiatrist's report filed, and upon advice of the same to petitioner in open court on April 22, 1954, the petitioner "stated that he desired to discuss his case with an attorney" and was given leave time to consult with John M. Copenhaver, an attorney of Redmond, Oregon. On April 27, 1954, petitioner again appeared in open court, where the District Attorney reported that the petitioner had "decided that he did not wish to consult with an attorney regarding this case," whereupon the court asked petitioner "if it was his decision not to discuss his case with the attorney he had requested and he replied that it was" and he further "replied that he was" ready for further proceedings in the case. Whereupon, the court sentenced petitioner "to serve not to exceed twenty years in the Oregon State Penitentiary." Throughout the proceedings the petitioner, in open court, waived any presentence report or hearing.

The respondent has answered to an order of this Court to show cause why the requested writ should not issue.

Petitioner's two tenable grounds for relief are, briefly:

1) That the petitioner was deprived of his Constitutional right to the benefit of counsel; and

(2) That the Court abused its discretion in the proceedings by accepting petitioner's plea of guilty.

Petitioner in his brief states:

> "* * * After the submission of the report by the state psychiatrist, the trial judge must have realized that the petitioner did not have the intelligence and

> mental capacity at the time of the proceedings, to waive counsel, and counsel should have been appointed to advise petitioner prior to the sentencing on April 27, 1954, whether requested or not."

It appears from the record herein that heretofore the petitioner has had a full hearing in the Circuit Court of Oregon for Marion County upon his petition for a review of his sentence pursuant to the Oregon Post-Conviction Act § 138.510, 138.680, resulting adversely to petitioner. An appeal from this result to the Supreme Court was dismissed on November 28, 1960.

The psychiatrist's report herein states, *inter alia:*

> "This man is quite dangerous to be at large. He is not at all responsible for his actions, but at the same time there is little, if anything that can be done either medically or psychiatrically to help him to become a stable individual. For his own protection and for the protection of society, he should be confined in an institution until such time as he can be deemed safe to be at large. Inasmuch as he cannot be 'cured' by medical or psychiatric means in the present state of our knowledge and would not benefit from treatment at a hospital for the mentally ill, it would seem best that he be confined in the penitentiary for the maximum time allowable under the statutes ,with the proviso that if at any time it would seem indicated that medical or psychiatric care would be of help to him, that he be transferred to an institution for the care and treatment of mental and neurological disorders. It would be well to send along his medical history when he is sent to the penitentiary."

ORS § 137.111 provides:

> "After the presentence hearing and upon the consideration of the psychiatric report required by ORS

> 137.112 to 137.116, the court may, in its discretion, in lieu of any other sentence authorized by law for such crime, sentence any person convicted under ORS 163.210, 163.220, 163.270, 167.035, 167.040 or 167.045 to an indeterminate term not exceeding the natural life of such person if:
>
> "(1) The offense involved a child under the age of 16 years; and
>
> "(2) The court finds that such person has a mental or emotional disturbance, deficiency or condition predisposing him to the commission of any crime punishable under ORS 163.210, 163.220, 163.270, 167.035, 167.040 or 167.045 to a degree rendering the person a menace to the health or safety of others."

It is self-evident from the sentence imposed that the court in its discretion did not elect to deal with the petitioner as a sexual psychopath but rather as an adult person duly convicted of the crime as charged in the information.

As to the court's discretion in these matters, see *State v. McDaniel,* 307 S.W.2d 42, 46 (Mo. Ct. App. 1957):

> "We are unwilling to say that the trial court abused its discretion in ordering the defendant tried on the criminal charge. Even if the court had specifically found that the defendant was a sexual psychopath, nevertheless, it could order him tried criminally. This right of discretion partakes of the same right of discretion to parole a person after conviction. We know of no case in which an appellate court has held that a trial court's discretion to parole had been abused."

See, also, *Wilson v. State,* 139 N.E.2d 554, at 557, 236 Ind. 278 (1957):

> "* * * It is true that both medical experts stated that, in their opinion, appellant is a criminal sexual

> psychopathic person, within the meaning of the law. However, the court was not bound by the conclusion of the medical experts. It was his right and duty to consider both the facts and the reasoning upon which these experts based their conclusions and to arrive at his own conclusion as to the physical condition and the legal status of the appellant. This conclusion involves two considerations, (1) the statutory definition of a 'criminal sexual psychopathic person' and (2) the facts in evidence regarding appellant's condition. * * *"

Next, dealing with petitioner's argument that the court in view of the psychiatrist's report acted arbitrarily in not finding petitioner incompetent, accepting petitioner's statement that he did not desire to be represented by counsel, and in allowing entry of his plea of guilty.

It is most difficult for a trial court to determine just when or when not to accept a defendant at his word as to his refusal of counsel. It is a matter that should be and is left to the judicious discretion of the court who has the "feel of the situation" in its hands. ORS §§ 136.150 and 136.410, respectively, read:

> "*Mental condition at time of trial.* If before or during the trial in any criminal case the court has reasonable ground to believe that the defendant, against whom an indictment has been found or an information filed, is insane or mentally defective to the extent that he is unable to understand the proceedings against him or to assist in his defense, the court shall immediately fix a time for a hearing to determine the defendant's mental condition. The court may appoint one or more disinterested qualified experts to examine the defendant with regard to his present

mental condition and to testify at the hearing. Other evidence regarding the defendant's mental condition may be introduced at the hearing by either party."

"*Morbid propensity to commit prohibited act as a defense.* A morbid propensity to commit a prohibited act, existing in the mind of a person who is not shown to have been incapable of knowing the wrongfulness of the act, forms no defense to a prosecution for committing the act."

State v. Nelson, 162 Ore. 430, 441 (1939), advises us:

"Whether there were reasonable grounds to believe that the defendant was insane, under chapter 293, Oregon Laws 1937 . . . [now ORS 136.410], was a question for the discretion of the trial court: State v. Peterson, 90 Wash. 479, 156 P. 542; People v. McElvaine, 125 N.Y. 596, 26 N.E. 929; State v. Stone, 111 Or. 227, 226 P. 430; 16 C.J. 789, 790, § 2015. There was no abuse of discretion on the part of the trial court to refuse to have a further hearing under the circumstances. * * *"

So, I find here that there is no showing that in view of the psychiatric report the court was capricious or arbitrarily indifferent towards petitioner's Constitutional rights in its taking petitioner at his word. The trial court's discretion in letting petitioner's plea of guilty stand and taking petitioner at his word that he did not desire counsel cannot be disturbed.

Counsel for respondent is requested to submit appropriate order of dismissal of petitioner's petition and cause.

DATED March 28, 1962.

APPENDIX C

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES– vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
1959				
Sept. 9	Falconer, John M.	Prosecution Under Wrong Statute	No	Released
Oct. 2	Young, Clarence E.	Excessive Sentence	No	Released
Nov. 13	Roach, William O.	Faulty Sentence Procedure	Yes	Resentenced
Dec. 17	Marshall, James F.	Faulty Sentence Procedure	No	Released
1960				
Feb. 4	Nelson, George	Incompetent Waiver	No	Resentenced
Apr. 7	Kirchmeyer, John W.	Incompetent Waiver	No	Resentenced
Apr. 20	Crow, Delbert Lee	Faulty Sentence Procedure	No	Released

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES– vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
July 5	Gilman, Donald M.	Faulty Sentence Procedure	No	Released
Aug. 6	Pye, Robert V.	Faulty Probation Revocation	No	Released
Sept. 30	Bloor, William P.	Faulty Sentence Procedure	No	Resentenced
Oct. 27	Williams, Richard E.	Incompetent Waiver	No	Resentenced
Dec. 5	Porter, Earl Robert	Faulty Probation Revocation	No	Released
1961				
Jan. 12	Eubanks, Harvey	Excessive Sentence	Yes	Resentenced

APPENDIX C—Continued

DATE OF ORDER GRANTING RELIEF	NAME (ALL CASES– vs. GLADDEN	DEFECT FOUND	REPRESENTED BY ATTORNEY AT CRIMINAL TRIAL	FINAL RESULT OF POST-CONVICTION
Aug. 25	Gidley, James W. S.	Faulty Sentence Procedure	No	Resentenced
Oct. 6	Symons, Harry D.	Excessive Sentence	No	Released
1962				
Jan. 5	Founts, Eugene	Excessive Sentence	Yes	Resentenced
Feb. 1	Froembling, Harvey R.	Excessive Sentence	Yes	Resentenced (Pending)
Feb. 2	Watson, Ernest C.	Faulty Sentence Procedure	No	Resentenced
Feb. 3	Watters, Marion S.	Excessive Sentence	Yes	Resentenced
Feb. 22	Holland, Paul C.	Faulty Sentence Procedure	No	Resentenced