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THE POST-CONVICTION HEARING ACT— 1949–1960 AND BEYOND

JAMES E. STARRS

CRIMINAL PROCEDURE TO lawyer and layman alike rarely evokes more than extremist appraisals. Either it is an intolerable congeries of technicalities and senseless entanglements or it is the headline-catching, viscera-stirring sensationalism of a trial for one of the more awe-inspiring crimes. Criminal procedure is, however, certainly much more than that, for without effective procedure even the loftiest principles of substantive law would be inoperative. Just such a mechanism for effectuating our basic constitutional liberties is the Illinois Post-Conviction Hearing Act.¹ Its original purpose was to insure a corrective remedy for persons convicted in proceedings which did not conform to accepted constitutional standards. Now, more than eleven years after its approval, and after undergoing interpretation in thirty-seven reported decisions of the Illinois Supreme Court, it is meet that the act be evaluated both in the light of its initial design and the decisions which have construed it, and according to legislative and judicial efforts of a like vein elsewhere, as well as more basic policy determinants. An analysis of this nature will bear mute testimony to the status of the judicial process, both as an instrument in achieving a measured congruity of law to the requirements of certainty and as a means of assuring a continued correspondence between law and the elements of its growth.

The Post-Conviction Hearing Act was enacted to resolve a critical situation created by an apparently unfathomable post conviction "procedural morass" in Illinois, which had elicited first the suspicion and

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¹ ILL. REV. STAT. ch. 38, §§ 826–832 (1959) (approved August 4, 1949).

then the outright denunciation of the United States Supreme Court.² In case upon case,³ Illinois had argued that federal jurisdiction was lacking since Illinois courts had denied relief for adequate non-federal procedural reasons. In time, however, it became apparent that Illinois did not provide any proper procedure to permit challenges to the constitutional validity of its convictions. In consequence of this realization, the United States Supreme Court strongly recommended⁴ that the federal courts in Illinois take cognizance of petitions for writs of habeas corpus by state prisoners. In assuming such jurisdiction, the federal courts were advised that no evasion of the rule of exhaustion of state remedies was involved, since there were *in fact* no state remedies to exhaust. This propelled the Illinois Legislature into action.

The Post-Conviction Hearing Act was drafted to assure an adequate, simplified, and unequivocal method by which a person convicted in the Illinois courts could present his claims of constitutional deprivation. In consonance with that intent, an independent, original, and collateral proceeding of a civil character,⁵ somewhat akin to the statutory substitute for the common-law writ of error coram nobis,⁶ was devised to test the substantial denial of state or federal constitutional rights occurring in the course of the proceedings resulting in the conviction.

Even these preliminary terms establishing the nature and scope of the act manifest the necessity for judicial interpretation. How is a "substantial denial"⁷ to be distinguished from other denials of constitutional rights? As yet, the Illinois Supreme Court has not been confronted with this issue but it has, in passing, referred to "substantial" constitutional rights,⁸ a modifier neither expressed in the act itself nor explicated by the court's opinions. Further, is the recognition of such denials to be limited to those occasioned "in the proceedings which

² *Marino v. Ragen*, 332 U.S. 561 (1947). See particularly Mr. Justice Rutledge's concurring opinion, *ibid.*

³ *Foster v. Illinois*, 332 U.S. 134 (1947); *Carter v. Illinois*, 329 U.S. 173 (1946).

⁴ *Marino v. Ragen*, 332 U.S. 561 (1947).

⁵ *People v. Bernatowicz*, 413 Ill. 181, 108 N.E.2d 479 (1952). Therefore it would seem that the attributes of a civil proceeding should obtain, such as discovery and subpoena duces tecum. See Leighton, *Post-Trial Procedures*, 47 ILL. B. J. 261 (1958).

⁶ ILL. REV. STAT. ch. 110, § 72 (1959).

⁷ ILL. REV. STAT. ch. 38, § 826 (1959).

⁸ *People v. Hartman*, 408 Ill. 133, 96 N.E.2d 449 (1951).

resulted in his conviction"?⁹ If so, then on a plain reading of the statute, constitutional deprivations arising both prior and subsequent to the original trial should not be cognizable under the act. But, in *People v. Reeves*,¹⁰ the Illinois Supreme Court, after examining the constitutional validity of a pre-trial restoration hearing, decided, uninfluenced by whether the hearing was itself part of the proceedings resulting in his conviction, that no denial of due process was evident. Again in *People v. Griffin*,¹¹ on remand from the United States Supreme Court, a direction was issued to the trial court to provide free transcripts of the original trial to the defendant for the purpose of direct review by writ of error. Although unenunciated in the decision, it seems evident that the denial of a free transcript to an indigent defendant would not be sufficient to invoke the act since it did not occur in the proceedings resulting in the conviction. On analysis, however, the decision is sound, for otherwise form would be exalted over substance to the degree that, as before the act, no remedy would be available to contest this constitutional issue.¹²

Unlike the Uniform Post-Conviction Procedure Act,¹³ the Illinois Post-Conviction Hearing Act does not supplant by consolidation other extant post-conviction techniques.¹⁴ Rather, in supplementing them, it seeks to bridge the gap between them and federal habeas corpus.¹⁵ If, then, the purpose of the act was to remedy those situations where existing procedures were in some way inadequate, it would seem that resort to the act would be permissible only after an initial indication that no other procedure was available. This, in effect, was the dictum of the early decision in *People v. Hartman*,¹⁶ but, in the development of later

⁹ ILL. REV. STAT. ch. 38, § 826 (1959).

¹⁰ 412 Ill. 555, 107 N.E.2d 861 (1952).

¹¹ 9 Ill.2d 164, 137 N.E.2d 485 (1956).

¹² In Illinois, writ of error reviews only errors appearing on the face of the record. Habeas corpus examines jurisdiction over the person or subject matter and coram nobis lies to review matter dehors the record which, if known to the trial court, would have resulted in a different verdict. A request for a free transcript would not be within the scope of any of these remedies.

¹³ 9B UNIFORM LAWS ANN. 344 (1955). *Accord*, MD. CODE ANN. art. 27, § 645A (1957).

¹⁴ Nor are other remedies superseded under the motion to vacate sentence in the federal courts. 28 U.S.C.A. § 2255 (1948); *United States v. Morgan*, 346 U.S. 502 (1954).

¹⁵ *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953).

¹⁶ 408 Ill. 133, 96 N.E.2d 449 (1951).

cases, the requirement was not reasserted.¹⁷ Today, therefore, in Illinois, not only is there no exclusive codification of post-conviction procedures but the broad sweep of the post-conviction act itself has percolated into areas traditionally allocated to the writs of habeas corpus and coram nobis to the extent that the convicted criminal or his counsel may choose among various alternatives. Thus, under some facts, *i.e.*, the knowing use of perjured testimony, either a petition under the post-conviction act may be lodged or a proceeding under the statutory substitute for the writ of error coram nobis may be instituted; and under other situations, *i.e.*, lack of jurisdiction over the person, one may elect either to petition for a writ of habeas corpus or for post-conviction act relief; or again, on other occasions, *i.e.*, a confession coerced by force, either a post-conviction petition or direct review by writ of error may be selected. Indeed, the recent decisions reveal that it is the practice to petition under the act immediately after sentencing and to seek review by writ of error both of the conviction and the denial of post-conviction relief in a consolidated appeal.¹⁸

To be eligible to initiate a proceeding under the Post-Conviction Hearing Act, the petitioner must be "imprisoned in the penitentiary."¹⁹ All felons are included in this category,²⁰ except those who are confined to the county jail awaiting the execution of the death sentence and women committed to reformatories. However, the language of the act has been so judicially construed²¹ that the fact of conviction for a felony rather than the situs of confinement determines eligibility.

¹⁷ To require a showing not only of constitutional denials but the possibility of a different result without them, approximates this position. See *State v. Graves*, 251 N.C. 550, 112 S.E.2d 85, (1960), and Justice Daily's dissent in *People v. Hryciuk*, 5 Ill.2d 176, 186, 125 N.E.2d 61, 66 (1955).

¹⁸ *People v. Thomas*, 18 Ill.2d 439, 170 N.E.2d 543 (1960).

¹⁹ ILL. REV. STAT. ch. 38, § 826 (1959). Doubtless, situations may arise meriting the re-evaluation of this requirement to effect a common sense application of it. Assume, *ex hypothesi*, that a petitioner is on parole either from the conviction now challenged or from a later federal or state conviction, or that he is imprisoned under a subsequent federal or state conviction as a recidivist in consequence of the conviction now in issue, or that the petitioner, having served his sentence, seeks to upset the conviction in order to restore his civil rights or merely to eliminate the criminal stigma. It is conceivable that the petition will be peremptorily denied either since petitioner is not "imprisoned in the penitentiary" or since his imprisonment did not result from the conviction he strives to overturn.

²⁰ ILL. REV. STAT. ch. 38, § 585 (1959).

²¹ *People v. Dale*, 406 Ill. 238, 92 N.E.2d 761 (1950); *People v. Lewis*, 413 Ill. 116, 108 N.E.2d 473 (1952).

Proper venue under the act is, as it is in statutory *coram nobis*,²² in the court in which the conviction took place.²³ The administrative advantages of such a provision were persuasive in moving its adoption. The convicting court, certainly, is aware of the facts and background of the particular case, except, of course, where time dulls treacherous memory or where the petition is heard by a different judge than the one who sat at the original trial. Furthermore, the cost of obtaining the testimony of witnesses at the hearing will be considerably lessened, and the courts at the places of confinement, already surcharged with habeas corpus petitions, will not experience the additional burden of these petitions and, in all probability, will note a reduction in the number of habeas corpus petitions. On the other hand, there is something subtly instructive in the Maryland statute²⁴ providing for a hearing before the same judge who officiated at the original trial only when the petitioner consents.

A properly prepared petition must contain sufficient facts, without argumentation, to indicate a denial of constitutional rights. Mere conclusory declarations, therefore, are unsatisfactory.²⁵ In addition, the petition must identify all prior proceedings brought to secure relief from the conviction.²⁶ Affidavits or other relevant evidence should also be attached to the petition in substantiation of its factual claims or their absence should be satisfactorily explained.²⁷ Although doubtless a complete transcript of the trial proceedings may be attached to the post-conviction petition,²⁸ the decision in *Griffin v. Illinois*²⁹ poses the more acute problem of whether an indigent defendant may demand as of right a free transcript of the trial to buttress the factual assertions of

²² ILL. REV. STAT. ch. 110, § 72 (1959). But a petition for a writ of habeas corpus may be entertained either by the court at the place of confinement or by the court where the conviction occurred. ILL. REV. STAT. ch. 65, § 2 (1959).

²³ *Accord*, 28 U.S.C.A. § 2255 (1948); UNIFORM POST-CONVICTION PROCEDURE ACT § 3, 9B UNIFORM LAWS ANN. 344, 354 (1955).

²⁴ MD. CODE ANN. art. 27, § 645G (1957). In Oregon venue is at the place where the petitioner is imprisoned. ORE. REV. STAT. ch. 636, § 6 (1959).

²⁵ *People v. Bernatowicz*, 413 Ill. 181, 108 N.E.2d 479 (1952).

²⁶ ILL. REV. STAT. ch. 38, § 827 (1959).

²⁷ *Ibid.*

²⁸ *People v. Bernatowicz*, 413 Ill. 181, 108 N.E.2d 479 (1952).

²⁹ 351 U.S. 12 (1956).

his petition.³⁰ The equal-protection-of-the-laws rationale of the *Griffin* holding would appear to be determinative of this issue, too, particularly since, like the writ of error on direct review,³¹ a post-conviction petition may be filed as of right equally by rich and poor alike.

A few years after the enactment of the Post-Conviction Hearing Act, one commentator, in surveying the effect of that act, remarked that "in Cook County, it has become the practice to file a motion to dismiss automatically on the first appearance of the case."³² The indication was, therefore, that rather than answering the contentions of the petition and proceeding to a hearing on the merits, the State's Attorney of Cook County had arbitrarily entered a motion to dismiss in all cases. Not until the *Jennings* decision in 1952,³³ on remand from the United States Supreme Court, was the appropriate ambit of the motion to dismiss clarified. Under that decision and under subsequent interpretations, the motion to dismiss would be properly interposed in any one of the following five situations:

1. Whenever the petition has been filed more than five years from the date of conviction.³⁴ Although the statute provides an exemption for those delays which were not due to the petitioner's culpable negligence,³⁵ this issue would be conveniently determinable by the court on argument on the motion to dismiss. The vagueness of the terms "culpable negligence," incorporated from the provision on appeal in

³⁰ ILL. REV. STAT. ch. 110, § 101.27 (1959), and ILL. REV. STAT. ch. 37, § 163 F2 (1959), relate rather to furnishing a free transcript of the trial on demand of the judge or State's Attorney at the post-conviction hearing or to granting a free transcript of the post-conviction hearing on filing a writ of error than to the right to a free transcript of the trial to be attached initially to the petition. And ILL. REV. STAT. ch. 110, § 101.65-1 (1959), appears limited to situations of direct review from the conviction.

³¹ ILL. REV. STAT. ch. 38, § 769.1 (1959).

³² Seidensticker, *The Illinois Post-Conviction Hearing Act: A Survey*, 1 DE PAUL LAW REV. 243, 248 (1952).

³³ *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952).

³⁴ ILL. REV. STAT. ch. 38, § 826 (1959), reads: "No proceeding under this Act shall be commenced more than five years after rendition of final judgment . . . unless the petitioner alleges facts showing that the delay was not due to his culpable negligence." There is no provision for a period of limitations under either the UNIFORM POST-CONVICTION PROCEDURE ACT or 28 U.S.C.A. § 2255 (1948) (motion to vacate sentence). The strong but moot inference is that claims pressed beyond the five-year period are not meritorious.

³⁵ A more formidable proviso is found in N.C. GEN. STAT. § 15-217 (1943) ("laches or negligence").

section 76 of the Civil Practice Act,³⁶ invites judicial delineation, but no reported³⁷ decisions have yet demarked their limits. However, it seems highly probable that the construction of the same language as employed in statutory *coram nobis*³⁸ could be utilized to give content to those words here, particularly since these remedies are *in pari materia*.

2. Whenever the factual allegations of the petition, assumed to be true, do not reveal the violation of a federal or state constitutional right. Of those contentions which do not evidence constitutional deprivations, the following are representative.

a. Ordinary matters of procedure,³⁹ such as the insufficiency of the indictment,⁴⁰ the granting of a continuance,⁴¹ and rulings on evidence,⁴² are not constitutional questions.

b. The right to a speedy trial is not denied by a violation of the "four term act"⁴³ unless the delay is arbitrary and oppressive;⁴⁴ nor is it violated by an arraignment six months after an arrest when the delay was occasioned by the conviction and four month imprisonment of the petitioner for a crime committed while in jail.⁴⁵

c. The right to due process of law is not infringed by the incompetency of counsel of one's own choosing except when it reduces the trial to a farce or sham.⁴⁶ So, too, no infraction of due process is involved in the mere failure to advise an eighteen-year old in a non-capital case of his right to counsel unless the petitioner indicates "that he did not know of his right to counsel, that he did not fully under-

³⁶ ILL. REV. STAT. ch. 110, § 76 (1959).

³⁷ The decisions in two federal habeas corpus actions, *i.e.*, *United States ex rel. Dopkowski v. Randolph*, 262 F.2d. 10 (7th Cir. 1958), and *United States ex rel. Lilyroth v. Ragen*, 222 F.2d. 654 (7th Cir. 1955), refer to earlier unreported state denials of post-conviction petitions by those relators in which the Illinois Supreme Court refused to apply the concept of a tolling of the five-year period during the petitioners' confinement in Washington and Indiana, respectively.

³⁸ ILL. REV. STAT. ch. 110, § 72 (1959).

³⁹ *People v. Hartman*, 408 Ill. 133, 96 N.E.2d 449 (1951).

⁴⁰ *People v. Adams*, 4 Ill.2d 453, 123 N.E.2d 327 (1954).

⁴¹ *People v. Farley*, 408 Ill. 288, 96 N.E.2d 453 (1951).

⁴² *People v. Kirkwood*, 17 Ill.2d 23, 160 N.E.2d 766 (1959).

⁴³ ILL. REV. STAT. ch. 38, § 748 (1959).

⁴⁴ *People v. Hartman*, 408 Ill. 133, 96 N.E.2d 449 (1951); *People v. Morris*, 3 Ill.2d 437, 121 N.E.2d 810 (1954).

⁴⁵ *People v. Allen*, 15 Ill.2d 455, 155 N.E.2d 561 (1959).

⁴⁶ *People v. Mitchell*, 411 Ill. 407, 104 N.E.2d 285 (1952); *People v. Heirens*, 4 Ill.2d 131, 122 N.E.2d 231 (1954).

stand the proceedings, that he was ignorant, illiterate or incompetent;⁴⁷ nor is it a federal constitutional deprivation to fail to assign counsel at the arraignment;⁴⁸ nor is it the denial of a state constitutional right not to appoint counsel at such time, unless the petitioner certifies his inability to procure counsel.⁴⁹ Further, the stipulation by an assistant public defender of the petitioner's sanity and a directed verdict of sanity entered on such stipulation at a pre-trial restoration proceeding are not violative of due process.⁵⁰ A confession induced by even a concededly unconstitutional conviction in an earlier trial does not present a constitutional issue.⁵¹

d. The right to trial by jury is not eroded by an instruction that the jurors are the triers of fact and law, since the instruction as a whole renders this particular segment innocuous and since, as so limited, it would not constitute reversible error on direct review.⁵²

Contrariwise, the following instances have been held to constitute denials of constitutional rights.

a. The right to an impartial jury is violated by necessarily and incurably inflammatory newspaper reports of a trial which are read by all the jurors, even though on questioning by the trial judge the jury deny the prejudicial effect of the reports, and despite a cautionary admonition to them from the judge.⁵³ Moreover, there is no impartial jury when the members of a jury either have served on a jury which has just acquitted the defendant of a similar, though separate, charge or has heard the evidence at the previous trial.⁵⁴

b. It is a denial of equal protection of the laws to refuse a free transcript of the trial record to an indigent defendant who seeks direct review by writ of error where review is a matter of right to all who apply.⁵⁵

c. A court without jurisdiction of the person or subject matter cannot constitutionally try an accused.⁵⁶

⁴⁷ *People v. Pring*, 414 Ill. 63, 69, 110 N.E.2d 214, 217 (1953).

⁴⁸ *People v. Clark*, 405 Ill. 483, 91 N.E.2d 410 (1950).

⁴⁹ *Ibid.*

⁵⁰ *People v. Reeves*, 412 Ill. 555, 107 N.E.2d 861 (1952).

⁵¹ *People v. LaFrana*, 4 Ill.2d 261, 122 N.E.2d 583 (1954).

⁵² *People v. Joyce*, 1 Ill.2d 225, 115 N.E.2d 262 (1953).

⁵³ *People v. Hryciuk*, 5 Ill.2d 176, 125 N.E.2d 61 (1955).

⁵⁴ *People v. Adams*, 4 Ill.2d 453, 123 N.E.2d 327 (1954) (dictum).

⁵⁵ *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁵⁶ *People v. Manning*, 412 Ill. 519, 107 N.E.2d 856 (1952); *People v. Jennings*, 11 Ill.2d 610, 144 N.E.2d 612 (1957).

d. The right to counsel is denied when the attorney of one's own choice⁵⁷ or appointed counsel⁵⁸ is so incompetent that the proceedings are reduced to a farce or sham and become, in effect, a travesty on justice.

e. The requirements of due process are not met by the use of knowingly perjured testimony, except where the jury is apprized that the witness who perjures himself has a motive to do so.⁵⁹ Of course, due process will not permit the coercion of a confession,⁶⁰ nor the inducement of a guilty plea by a promise to recommend leniency, when thereafter the prosecutor reneges, even though the recommendation, if it had been made, would not have been binding on the court.⁶¹

3. When no affidavits accompany the petition and their absence is not properly explained. If from the face of the record and the verified statements of the petition the violation of a constitutional right is fairly inferable, then the failure to attach affidavits will be excused.⁶²

4. When the petition reveals that a prior original or amended petition had been filed under the act. This generalization results directly from the terms of section 828 of the act, which, although it speaks in the language of waiver, was designed to prohibit, in all cases, more than one original, amended, or supplemental post-conviction petition.⁶³ The reported decisions, however, have not touched upon this issue, nor do they indicate whether the section applies equally to prevent new post-conviction petitions when a prior petition was dismissed on motion. One prosecuting officer,⁶⁴ however, frankly concedes that a new petition will not be precluded by a previous dismissal on motion, at least where the dismissal is grounded in a lack of affidavits or a failure to state a constitutional issue. It is dubious, too,

⁵⁷ *People v. Cox*, 12 Ill.2d 265, 146 N.E.2d 19 (1957).

⁵⁸ *People v. Reeves*, 412 Ill. 555, 107 N.E.2d 861 (1952); *People v. Morris*, 3 Ill.2d 437, 121 N.E.2d 810 (1954); *People v. Thomas*, 18 Ill.2d 439, 170 N.E.2d 543 (1960).

⁵⁹ *Napue v. People*, 13 Ill.2d 566, 150 N.E.2d 613 (1958).

⁶⁰ *People v. Evans*, 4 Ill.2d 211, 122 N.E.2d 730 (1954).

⁶¹ *McKeag v. People*, 7 Ill.2d 586, 131 N.E.2d 517 (1956).

⁶² *People v. Reeves*, 412 Ill. 555, 107 N.E.2d 861 (1952).

⁶³ This interpretation of the legislative intent in that of Albert E. Jenner, Jr., in his exordium to the act. ILL. REV. STAT. ANN. ch. 38, § 826 (Supp. 1959). Observe also that, by dint of § 828, direct review by writ of error of constitutional issues which were or could have been concluded on a prior post-conviction petition, even though appeal therefrom is denied by a memorandum order, is precluded. *People v. Lewis*, 2 Ill.2d 323, 118 N.E.2d 11 (1954); *People v. Byrd*, 171 N.E.2d 782 (Ill. 1961).

⁶⁴ *Gaines, The Post Conviction Hearing Act*, 39 CH. B. REC. 418 (1957-1958).

whether a failure to seek review by writ of error from either the denial after a hearing or the dismissal on motion will foreclose any future petition.⁶⁵ But it would seem that, apart from the legislative purpose in enacting section 828, a failure to apply for writ of error, especially after a hearing, would manifest an infirmity of resolution approaching a waiver, if indeed it be not that, particularly since free transcripts on appeal are mandated by statute.⁶⁶

5. Whenever the petition or record indicates that a writ of error, accompanied by bill of exceptions, had been brought to the Illinois Supreme Court and that the conviction had been affirmed. A motion to dismiss for this reason is predicated basically on the concept of *res judicata*, which prevents the relitigation of constitutional issues once finally determined by the Illinois Supreme Court.⁶⁷ This doctrine has been interpreted at times⁶⁸ to include not only those issues which were adjudicated but also those which might have been. On other occasions, claims which could have been asserted before the court, if not raised, have been deemed to be waived.⁶⁹ Whether we speak of those claims which might have been addressed to the court on the prior review by writ of error as now waived or *res judicata*, a motion to dismiss will not properly be granted except in those cases where the identical allegations of constitutional defects now asserted had received a full and final hearing in the Illinois Supreme Court. To do otherwise would be to re-introduce the mechanical application of *res judicata* so roundly condemned in the *Jennings* decision.⁷⁰

If sufficient cause does not exist for a motion to dismiss, the State's Attorney must respond to the petition in an answer, which may be unverified⁷¹ but must be specific. Thereafter, a hearing should be held

⁶⁵ A passing remark by Justice, now Chief Justice, Schaefer in *People v. Allen*, 15 Ill.2d 455, 155 N.E.2d 561 (1959), makes it doubtful that a second petition would be precluded by a prior unappealed denial. But compare the contrary view in two unreported opinions, *i.e.*, *People v. Canady*, No. 1867 and *People v. Brooks*, No. 1795.

⁶⁶ ILL. REV. STAT. ch. 37, § 163 F2 (1959).

⁶⁷ *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952). *People v. Dale* 406 Ill. 238, 92 N.E.2d 761 (1950); *People v. Dolgin*, 6 Ill.2d 109, 126 N.E.2d 681 (1955); *Davies v. People*, 10 Ill.2d 11, 139 N.E.2d 216 (1956).

⁶⁸ *People v. Thompson*, 392 Ill. 589, 65 N.E.2d 362 (1946).

⁶⁹ *People v. Johnson*, 15 Ill.2d 244, 154 N.E.2d 274 (1958); *People v. Kirkrand*, 14 Ill.2d 86, 150 N.E.2d 788 (1958).

⁷⁰ *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952).

⁷¹ The answer, to be received as evidence, should be verified, *Crowley, Judgment, Sentence and Review*, 1953 U. ILL. L. F. 383, 401.

at which two general matters must be resolved.⁷² Initially, the court must determine whether the claims now made were or could have been litigated in any previous proceeding. If the court concludes that the petitioner has had prior adequate opportunity to present these allegations, the petition should be dismissed without proceeding further. If, however, the issues are neither *res judicata* nor waived, then the court should decide whether by a fair preponderance of the evidence introduced at the hearing the petitioner has sustained his burden of proving substantial denials of constitutional rights.

Waiver, of course, consists only in the intentional relinquishment of known constitutional rights. Naturally, there can be no waiver where an accused is prevented either by inculpable ignorance or other extrinsic factors from raising constitutional objections. Therefore, the decisions indicate at least two recurrent circumstances of waiver:

1. When direct review by writ of error with a bill of exceptions had been prosecuted from a judgment of conviction but the constitutional claims now enunciated were not then raised.⁷³

2. When the constitutional denials were not urged at the original trial by petitioner, who was then represented by counsel of his own choice or by competent appointed counsel and either failed to seek direct review by writ of error or to obtain a bill of exceptions, in cases of review by writ of error on the mandatory record.⁷⁴ At the time the *Jennings* decision elucidated the act's proper procedural course, defendants who failed to seek direct review could assert their indigence to rebut the doctrine of waiver, but with *Griffin v. Illinois*⁷⁵ and its statutory aftermath,⁷⁶ that defense no longer obtains.

Several factual contexts may provoke problems of the pertinence of the doctrine of *res judicata*. It may be that like constitutional matters

⁷² This format derives from *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952).

⁷³ *People v. Dolgin*, 6 Ill.2d 109, 126 N.E.2d 681 (1955); *Ciucci v. People*, 21 Ill.2d 81, 171 N.E.2d 34 (1960).

⁷⁴ *People v. Adams*, 4 Ill.2d 453, 123 N.E.2d 327 (1954) (dictum); *Ciucci v. People*, *supra* note 73. A waiver of ILL. REV. STAT. ch. 38, § 736a (1959), obtains when an uncounseled accused fails to interpose timely objection at the arraignment. *People v. Clark*, 405 Ill. 483, 91 N.E.2d 409 (1950). Other hypothetical situations of waiver, *i.e.*, neglect to assert constitutional objections on a prior petition for habeas corpus or *coram nobis* proceeding, have not yet drawn the attention of the Illinois Supreme Court, as revealed by the reported decisions. Also, under section 828 of the act, all constitutional claims "not raised on the original or an amended petition" are waived.

⁷⁵ 351 U.S. 12 (1956).

⁷⁶ ILL. REV. STAT. ch. 110, § 101.65-1 (1959).

were raised on a prior petition for a writ of habeas corpus, or for statutory coram nobis, or at the original trial itself. The decisions certify that a previous habeas corpus petition, heard either originally in the Supreme Court of Illinois⁷⁷ or before an "inferior" court,⁷⁸ will be res judicata on a post-conviction petition filed thereafter, unless new and significant evidence is now adduced on those matters previously litigated.⁷⁹ With respect to a previous denial of relief sought by way of writ of error coram nobis, it would appear, although not definitively established, that the doctrine of res judicata would preclude the relitigation of the same issues on a later post-conviction petition.⁸⁰

In one sphere, however, the reported decisions have, to a greater degree, carved out an area of certainty. The determination on constitutional issues at the original trial will not be res judicata in a post-conviction hearing when either no direct review by writ of error or when direct review by writ of error on the mandatory record alone was taken from the conviction.⁸¹ Then, if not conclusive, should any weight at all be accorded to the holding of the trial court on these matters? According to the decision in *People v. Jennings*,⁸² "due weight should be accorded that determination" but only where the "claims were fairly asserted and litigated. . . ."⁸³ On another occasion, the court viewed the trial court's determination as deserving of "some significance."⁸⁴ In still another case, the court observed that when both at the original trial and at the hearing on the post-conviction petition a confession was held to be voluntary, then to reverse those findings, a showing that they were "manifestly against the weight of the evidence"⁸⁵ must be made. With obvious vacuity, it can be asserted that

⁷⁷ *People v. Pring*, 414 Ill. 63, 110 N.E.2d 214 (1953).

⁷⁸ *People v. Evans*, 4 Ill.2d 211, 122 N.E.2d 730 (1954) (dictum).

⁷⁹ *Ibid.*

⁸⁰ *People v. Manning*, 412 Ill. 519, 107 N.E.2d 856 (1952).

⁸¹ Yet, a recent statute, ILL. REV. STAT. ch. 110, § 101.65-1 (1959) (free transcripts for indigent persons on appeal), might warrant a finding of waiver where one fails, through subjective causes, to press his claims of constitutional denials on appeal.

⁸² 411 Ill. 21, 25, 102 N.E.2d 824, 826 (1952).

⁸³ This proviso has proved to be of some singular significance. See *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953), where the issue of the voluntary character of a confession was held not to be "fairly asserted" when on the inquiry at the trial into the circumstances surrounding the giving of the confession a prosecuting official perjured himself.

⁸⁴ *Davies v. People*, 10 Ill.2d 11, 139 N.E.2d 216 (1956).

⁸⁵ *Reck v. People*, 7 Ill.2d 261, 130 N.E.2d 200 (1955).

there is an indefinable lacuna between no weight and conclusive weight to which the courts will assign prior trial court adjudications on constitutional claims.

In general, the procedure at the post conviction hearing will accord with that which, in the judge's discretion, is most suitable.⁸⁶ Therefore, the petitioner cannot assert an absolute right to be personally present⁸⁷ but representation by counsel, at least for indigent petitioners, would appear to be essential,⁸⁸ since the burden of proof is upon the petitioner at the hearing.⁸⁹ The introduction of evidence is also to be governed by the discretion of the hearing judge. Consequently, he need not hear oral testimony,⁹⁰ nor need he read the transcript of the trial,⁹¹ but in reconsidering issues once litigated at the original trial the court may not limit its investigation to matters presented at the original trial.⁹² If the court determines that there has been a substantial denial of constitutional rights, the usual disposition will be to set aside the conviction and order a new trial,⁹³ but the court, in some instances, is empowered to make appropriate orders without disturbing the conviction.⁹⁴

Appeal by either petitioner or State's Attorney⁹⁵ from a denial of

⁸⁶ *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953). Under these terms, it may be that the court could convene a jury to hear the cause. In North Carolina, the Post-Conviction Hearing Act expressly excludes a jury. N.C. GEN. STAT., § 15-221 (1943).

⁸⁷ ILL. REV. STAT. ch. 38, § 831 (1959); *People v. Adams*, 4 Ill.2d 453, 123 N.E.2d 327 (1954) (dictum); *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952). The Oregon statute, *i.e.*, ORE. REV. STAT. ch. 636, § 12 (1959), requires the presence of the prisoner unless the sole issue is one of law.

⁸⁸ *People v. Mitchell*, 411 Ill. 407, 104 N.E.2d 285 (1952); *People v. Cummins*, 414 Ill. 308, 111 N.E.2d 307 (1953).

⁸⁹ *People v. Alden*, 15 Ill.2d 498, 155 N.E.2d 617 (1959); *People v. Thomas*, 18 Ill.2d 439, 170 N.E.2d 543 (1960).

⁹⁰ *People v. Mitchell*, 411 Ill. 407, 104 N.E.2d 285 (1952).

⁹¹ *People v. Thomas*, 18 Ill.2d 439, 170 N.E.2d 543 (1960). Under ILL. REV. STAT. ch. 37, § 163 F2 (1959), a free transcript of the trial court record, in whole or in part, will be granted to the petitioner whenever the court or state's attorney so directs. The concluding clause, of course, seriously narrows the usefulness of this provision and may therefore contravene the mandate of *Griffin v. Illinois*, 351 U.S. 12 (1956).

⁹² *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953).

⁹³ ILL. REV. STAT. ch. 38 § 831 (1959). *People v. Wakat*, *supra* note 92. *People v. Jennings*, 411 Ill. 21, 102 N.E.2d 824 (1952).

⁹⁴ *People v. Dolgin*, 6 Ill.2d 109, 126 N.E.2d 681 (1955) (sentence reduced from two to ten years to one to five years, but decision reversed on other grounds); *People v. Griffin*, 9 Ill.2d 164, 137 N.E.2d 485 (1956) (free transcript of trial record).

⁹⁵ *People v. Wakat*, 415 Ill. 610, 114 N.E.2d 706 (1953); *People v. Joyce*, 1 Ill.2d 225, 115 N.E.2d 262 (1953).

post-conviction relief is by petition for writ of error to the Illinois Supreme Court which, in the majority of cases,⁹⁶ has been refused by the court, usually in the terms of unpublished memoranda orders.⁹⁷ To perfect such review, it is requisite to file the petition within six months⁹⁸ of the entry of the judgment at the post-conviction hearing, but a failure to do so is not a bar to review unless the statute of limitations is timely raised by motion.⁹⁹ Furthermore, on application for review the clerk of the trial court must submit, within thirty days, "all records, pleadings, exhibits and evidence presented to the trial court."¹⁰⁰ In reviewing—once the application is allowed—the trial court's decision, the court has declared that only "manifestly erroneous"¹⁰¹ holdings will be reversed. Re-examination and reassessment of the evidence presented to the trial court is the method by which that issue will be determined.

Even the casual observer must have gleaned from this discussion that the Post-Conviction Hearing Act has not achieved administrative perfection. Nowhere else is the disclosure of the functional defect in failing to coordinate the remedies of coram nobis and habeas corpus into one comprehensive procedure more telling than in the decisions of the United States Court of Appeals for the Seventh Circuit in cases where Illinois state prisoners had petitioned for release by way of federal habeas corpus. By statutory mandate,¹⁰² federal courts cannot exercise jurisdiction over petitions for habeas corpus by state prisoners until there has been an exhaustion of remedies available in the state courts as to the exact question which is now urged. In applying this rule, a recent case¹⁰³ held that a state court prisoner who had fully utilized the Post-Conviction Hearing Act could not apply to the federal courts

⁹⁶ Leighton, *Post-Trial Procedure*, 47 ILL. B. J. 261 (1958).

⁹⁷ Gaines, *supra* note 64.

⁹⁸ N.C. GEN. STAT., § 15-222 (1943) (60 days); MD. CODE ANN. art. 27, § 645-I (1957) (30 days).

⁹⁹ *People v. Bernatowicz*, 413 Ill. 181, 108 N.E.2d 479 (1952). An earlier unpublished opinion considered the defect to be jurisdictional. *People v. Washington*, No. 1265, Sup. Ct. Ill.

¹⁰⁰ ILL. REV. STAT. ch. 110, § 101.27 (1959); ILL. REV. STAT. ch. 37, § 163 F2 (1959). *Accord*, MD. CODE ANN. art. 27, § 645-E (1957), but only as to indigent appellants.

¹⁰¹ *People v. Alden*, 15 Ill.2d 498, 155 N.E.2d 617 (1959); *Davies v. People*, 10 Ill.2d 11, 139 N.E.2d 216 (1956); *Reck v. People*, 7 Ill.2d 261, 130 N.E.2d 200 (1955).

¹⁰² 28 U.S.C.A. § 2254 (1948).

¹⁰³ *United States ex rel. Sproch v. Ragen*, 246 F.2d 264 (7th Cir. 1957).

for release until he had petitioned for certiorari to the United States Supreme Court from denial of a later petition in the state court for habeas corpus.¹⁰⁴ On principle, of course, the decision is not reconcilable with the doctrines of *res judicata* and waiver or the Post-Conviction Hearing Act itself,¹⁰⁵ but apart from that, this unfortunate result might have been avoided if there were in Illinois only one post-conviction procedure of a collateral nature.

From the juridical vantage point, then, the proliferation of post-conviction remedies, although well-intentioned, is inherently unsound. Psychological considerations compel the same evaluation. It should be a matter of common knowledge that before the reformatory process may begin the transformation of the prisoner back to proper social behavior, he must acquiesce in it. Yet, what incentive is there for one imprisoned in the penitentiary to do so when we offer him the tantalizing bait of numerous, involved post-conviction remedies which awake in him an endless succession of "one last hope" for release? Under such circumstances, the truly guilty criminal, even though unjustly convicted, will never form that firm purpose of amendment necessary to his proper readjustment and, indeed, each denial of the long series of post-conviction procedures will, on the contrary, inculcate in him a fixed abomination for the law and, what he deems to be, the administrative artificialities thwarting his release.

Apart from a consolidation of all post-conviction remedies of a collateral character into one direct and final format, the creation of a new court, limited in jurisdiction to constitutional matters, might be sug-

¹⁰⁴ The dilemma of petitioner is not lessened by this admonition since if a petition now filed for certiorari is denied as untimely, this will itself constitute a failure to exhaust state remedies. *United States ex rel. Peckham v. Ragen*, 241 F.2d 318 (7th Cir. 1957). So too, a denial of post-conviction relief for culpable failure to file within the five-year period amounts to a neglect to exhaust your state remedies. *United States ex rel. Dopkowski v. Randolph*, 262 F.2d 10 (7th Cir. 1958). There is also no fulfillment of the rule in the following cases: petition under Post-Conviction Hearing Act pending before state court, *United States ex rel. Hunter v. Bibb*, 249 F.2d 839 (7th Cir. 1957); failure to petition under the act even though the five-year period has now expired, *United States ex rel. Stevens v. Ragen*, 244 F.2d 420 (7th Cir. 1957); neglect to allege the issue now presented on the post-conviction petition even though a denial of relief has now effected a waiver of that matter, *United States ex rel. Langer v. Ragen*, 237 F.2d 827 (7th Cir. 1956); no application for writ of error from dismissal of post-conviction petition even though the six-month period has now expired, *United States ex rel. Stewart v. Ragen*, 231 F.2d 312 (7th Cir. 1956); denial of a petition for post-conviction relief which sought to excuse its untimely filing for reasons different from those now asserted, *United States ex rel. Lilyroth v. Ragen*, 222 F.2d 654 (7th Cir. 1955).

¹⁰⁵ ILL. REV. STAT. ch. 38, § 828 (1959).

gested in order not alone to alleviate these procedural and psychological disadvantages but more to stimulate and perpetuate a positive public concern for the mechanics of assuring their constitutional rights. In other legal systems,¹⁰⁶ such a court presently functions to clarify constitutional issues, usually when they arise in the course of the trial. The business of this proposed court could extend beyond constitutional questions relevant to a post-conviction petition for relief to circumscribe the totality of constitutional issues, which could be presented to the court by direct petition or by certification from other courts of original or appellate jurisdiction. Where its jurisdiction over a post-conviction petition is invoked, the procedure in this court might require a hearing in all but limited situations, where for jurisdictional or other formal reasons a petition were to be preliminarily denied, with, however, a right in all cases to reapply. In addition, the composition of the court might include three judges, drawn possibly from the ranks of retired attorneys, judges, or even law professors, for whom a seat on this court would be more honorary than compensatory. Decisions, in written and officially reported form in all cases, of this constitutional court should not be appealable except by petition for certiorari to the United States Supreme Court. It should be evident even from this succinct outline that the design envisioned by this court is that of simplicity, brevity, finality, and certainty where constitutional issues arise. The fear is not, it is well to add, that our vision will no longer be toward the *summum jus* but that, despite this laudable goal, the *summa injuria* will ensue.

¹⁰⁶ In West Germany the Federal Constitutional Court (*Bundesverfassungsgericht*, abbreviated BVG) of twenty-four judges possesses very extensive jurisdiction, including, since relevant to our inquiry, "complaints by private persons who assert that their constitutional rights are violated by the public authority." Dietze, *Constitutional Courts in Europe*, 60 DICK. L. REV. 313, 321 (1956). See also Rheinstein, *The Approach to German Law*, 34 IND. L. J. 546, 548 (1959). The Italian Constitution of 1947 created a Constitutional Court (*Corte Costituzionale*) which, because of the cumbersome process designed to select its fifteen judges, did not become operative until 1956. Article 137 of the Italian Constitution expressly prohibits all appellate review of the decisions of the court but, unfortunately, article 134 so limits the jurisdiction of the court that its primary concern is with claimed unconstitutional legislation. Cassandro, *The Constitutional Court of Italy*, 8 AM. J. COMP. L. 1 (1959); Farrelly & Chan, *Italy's Constitutional Court: Procedural Aspects*, 6 AM. J. COMP. L. 314 (1957); 2 PEASLEE, CONSTITUTIONS OF NATIONS 275-302 (1950). For Venezuela, see Nebreda-Urbaneja and Berg, *Introduction to the Venezuelan Legal System—A Typical Civil Law System of Latin America*, 10 DE PAUL L. REV. 41, 45-46 (1960). And see, in general, KELSEN, GENERAL THEORY OF LAW AND STATE 155 ff. (1945).