Silencing Gideon's Trumpet: The Plight of the Indigent Prisoner

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insignificant, she sought to have the faculty's efforts focused on methods of addressing the school's serious problems with education.

Of late, she has concentrated at the Department of Public Advocacy on death penalty trials and appeals. Her specialty, for which she is nationally known, is jury composition challenges. Gail always has time for sharing her knowledge with other attorneys wherever or whenever.

She and her husband, Kevin McNally, are the proud parents of Sean Fitz and Jesse Dylan with another child on the way in April. Even though an ardent vegetarian, she has been known to crave a "good" hamburger when pregnant. Her free time is spent with her children, "the land" that she lives on in Bald Knob (just Northwest of Frankfort), her food co-op, and the magnificent house she helped construct.

As her life attests, she feels that the most important value she and Kevin teach their children is the service of others in need.

We are in Gail's debt for her personal and professional example. Thanks, Gail, for the unselfish gift of yourself.

ED MONAHAN

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THE CONVEYOR BELT WAS A GREAT IDEA.
and present that person's case." Last year Pat had plenty of chances to put that philosophy into effect as he opened 246 cases, 57% of which were felony cases.

He and his wife, Carla, like Hazard and the Appalachian Mountains. Carla is a nursing student at Hazard Community College. Not surprisingly, Pat lists his interests as fishing, hiking and camping in the Smokie Mountains and the Cherokee National Forest.

Pat usually begins his day with a morning run in the hills, with Hogan, the family pet dog.

Aside from outdoor activities, Pat mentioned his love of travel (perhaps sparked by his birth in Germany where his father was stationed while in the service). Pat spent a summer traveling in Europe. He became fluent in Italian when he spent his junior year of college at Wake-Forest University abroad, studying history and art at the University of Venice.

Pat's parents are Hank and Hareth McNally. They live in St. Louis, Missouri. Pat says his parents instilled in him the trait to carefully examine the obvious and not to quickly jump to conclusions. Perhaps, this would explain his mom's occasional reference to Pat's contentious nature as a child.

Scott Buchanan has said that "Every human being has a responsibility for injustice anywhere in the community." Pat's meeting his responsibility and then some.

The Advocate welcomes correspondence on subject treated in its pages.

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Every prisoner dreams the dream of Gideon: a two-page pro se hand-written petition filed in the United States Supreme Court is read, believed, and the unjust conviction is reversed. A new trial is had. Counsel is appointed, and when brought before the jury once again, there is an acquittal. Then, in most instances Gideon’s dream is just that, a dream. The prisoners are taught to believe that the measure of justice received is not dependent upon the amount of money one possesses. As long as we adopt the notion that the practice of criminal law is a form of free enterprise, the quality of justice will always be strangled by money.

Nowhere is this fact so evident as in our own prison system, where even after conviction, money talks. The bright line rule delineating the right to counsel—that the state must provide an attorney for any defendant, too poor to hire one, who faces a prison sentence—stops at the penitentiary gate when one’s appeal as a matter of right has been exhausted. It is as though finally, society says enough, and throws away the key. But it is hard to forgive.

Allison Connelly

Post-Conviction Law and Comment

SILENCING GIDEON’S TRUMPET: THE PLIGHT OF THE INDIGENT PRISONER

Slowly but surely the prison walls have been eroded by the public’s increasing awareness of the sordid conditions which often characterize prison life. And, in a sense, Gideon’s dream did come true when a federal court found Kentucky’s prisons unconstitutional due to an inmate initiated class action suit that indicted the entire prison system. Finally, the judiciary abandoned its traditional hands-off policy. Still, to suggest that the system has treated the poor and indigent, the uncounselled and illiterate, equally, is ludicrous. Money still talks, and for those few with a medium of education, at least it money can’t, they can.

However, even convicted felons retain many constitutional rights. Those rights, such as their first amendment rights, the prohibition against cruel and unusual punishment, due process in prison proceedings, and protection against discrimination, would be hollow without access to the courts to enforce them. Rights without remedies are meaningless and access to the judicial process is the constitutional key upon which all other prisoner rights rest. It is for this very reason that court access, grounded in the Fourteenth Amendment and buttressed by the First, is a right of constitutional dimension. Johnson v. Avery, 393 U.S. 483 (1969); Ex parte Hall, 321 U.S. 546 (1941). Yet, in enervating the right of access to the courts, it is the indigent and uncounselled that suffer. They face almost insurmountable obstacles and handicaps not shared by their moneyed counterparts. One need only examine those areas that are prerequisites to meaningful court access, to reach the conclusion that wealth makes a difference.

Indigents and illiterates are unable to buy or obtain legal advice, and for those that do have the money, the right of access to the courts can on occasion be so burdensome that it becomes an insurmountable barrier.

The constitutional right to assistance of counsel in a post-conviction proceeding setting is separate and distinct from the right to counsel found in the Sixth Amendment. In this context, attorney assistance means that each prisoner has access to an attorney in the institution to advise, aid, review plea agreements, and other matters, and help the inmate draft initial pleadings and motions for the court’s hearing. It means that all prisoners have at least one avenue available for discussing the merits of their case and for obtaining advice in overcoming procedural problems. Moreover, where a meritorious issue is presented, the attorney may undertake full representation of the prisoner to insure those claims are properly presented to the court. Surprisingly, the Kentucky legislature and the United States District Court joined forces to provide for attorney assistance in Kentucky’s penal institutions. In this respect, Kentucky is a leader in its recognition that meaningful access to the courts can only be had through attorney assistance. It is through such assistance that the inherent unfairness and invidious discrimination faced by indigents and illiterates confined in penal institutions is redressed.

The greatest difficulty facing an indigent or illiterate prisoner lies in the collection of evidence before a pleading is even filed. Most prisoners do not have copies of their court docket, trial minutes, indictments, or final judgments; nor do they have funds and/or the necessity to obtain them. Many times, their incantatory requests to the clerks and courts are ignored or slurred and/or put on the shelf. Perhaps the most critical source of information is the trial transcript. While a financially solvent prisoner can purchase the transcript, such is far beyond the means of the indigent. Now, can they properly present their claims and avoid a finding of *frivolous* or summary dismissal without a transcript? Or even possess the knowledge to identify a legal error, and should they be expected to? The United States Supreme Court has stated that there is no general or constitutional right to obtain a transcript at state expense. In [*Durst v. Commonwealth*, Ky., 93 S.W.2d 782 (1936)], this principle was set forth when the court found that the state’s refusal to provide a transcript to a prisoner who had asked for a copy, even if held in Rush County, Ky., 93 S.W.2d 782 (1936); *Hines v. Commonwealth*, Ky., 345 S.W.2d 856 (1960); *Bramble v. Commonwealth*, Ky., 351 S.W.2d 872 (1961); *Mitchell v. Commonwealth*, Ky., 344 S.W.2d 157 (1960); *Berea v. Commonwealth*, Ky., 342 S.W.2d 872 (1960); *Whitaker v. Commonwealth*, Ky., 342 S.W.2d 609 (1960); *Stinson v. Commonwealth*, Ky., 341 S.W.2d 513 (1960); *Stinson v. Commonwealth*, Ky., 339 S.W.2d 856 (1960); *Stinson v. Commonwealth*, Ky., 333 S.W.2d 856 (1960); *Stinson v. Commonwealth*, Ky., 331 S.W.2d 856 (1960); *Stinson v. Commonwealth*, Ky., 330 S.W.2d 856 (1960).

In [*Draper v. Washington*, 572 U.S. 667 (1965)], the Kentucky courts have fully adopted the decisions of their federal counterparts. [*Daw v. Commonwealth*, Ky., 290 S.W.2d 465 (1956); *Stinson v. Commonwealth*, Ky., 452 S.W.2d 613 (1970); *Daw v. Commonwealth*, Ky., 652 S.W.2d 856 (1983)]. Equal protection arguments based on [*Griffin v. Illinois*, 351 U.S. 12 (1956)], have largely been unsuccessful, even though such "tools" are available "for a price to others." [*Id., *at 19. The United States Supreme Court answered such arguments by noting that justice requires an adequate opportunity to fairly present one’s claim, and not an absolute equal opportunity to present that same claim. *United States v. McGour*, 426 U.S. 317 (1970). See also, *Gillum v. Commonwealth*, supra, at 856. Only one federal circuit court has found an equal protection violation when the trial court refused to provide the prisoner with a transcript. *The Seventh Circuit Court held in *Bush v. United States*, 559 F.2d 452 (7th Cir. 1977), the a preexisting transcript must be provided free of cost to an indigent federal prisoner for use in a collateral proceeding because by Brant Parker and Johnny Hart

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wealthy prisoners could hire attorneys to search the transcript for errors, while poor prisoners couldn't. Such a holding is applicable to all records available to the public but not the prisoner.

In such a situation, the prejudice to the indigent and/or illiterate prisoner is obvious. The inmate must rely on memory, recognize the legal wrong, and then weave the wrong into the facts in a sensible manner. Failure to do so can lead to dismissal and even the loss of a meritorious claim. Of course, this doesn't happen to a person of means. Moreover, even if the claim survives, the indigent prisoner in the federal system is appointment of counsel is discretionary, 28 U.S.C. § 1915(e), while in Kentucky the issue is controlled by the Public Advocacy statute, court rules, and case law.

In Commonwealth v. Ivey, Ky., 599 S.W.2d 456 (1980), the Kentucky Supreme Court reconciled the conflicting provisions of KRS 31.110(2) and RCR 11.42, although RCR 11.42(15) provides for the appointment of counsel if an evidentiary hearing is required, the statutory requirements of KRS 31.110(1) and (2) entitle a convicted indigent prisoner to have an attorney in any post-conviction proceedings to the same extent as a person having his own counsel is so entitled. The Court concluded that RCR 11.42 set the minimum standard for appointment of counsel, while the statutory language evidenced a legislative intent that indigents who might consider indigents pro se pleadings to avoid the precision of a potentially meritorious claim.

However, the expansive reading given by the Ivey Court has been eroded by subsequent case law, in Ray v. Commonwealth, Ky.App., 633 S.W.2d 71 (1982), Ray sought to attack the underpinnings of his first degree PFO conviction with a CR 60.02 motion. He tendered a motion requesting the assistance of counsel. This request was denied. On appeal, the Court of Appeals held that KRS 31.110(1) does not provide for the appointment of counsel for one who isn't in detention and not under formal charges. The Court reasoned that Ray was not entitled to counsel at state expense because he wasn't being detained on the enhancing convictions but on the 1980 PFO conviction. Thus, an indigent prisoner is not entitled to the appointment of counsel in preparing a post-conviction petition if he isn't in "detention," but he is entitled to counsel if the court schedules an evidentiary hearing on the motion. This result is clearly inconsistent with Ivey where the Supreme Court emphatically stated that assistance of counsel was necessary to prevent an erroneous deprivation of valid grounds for voiding a conviction.

Subsequent Kentucky cases have given even a more technical reading to the right to appointed counsel in post-conviction proceedings, Allen v. Commonwealth, Ky., App., 668 S.W.2d 356 (1984), held that a written request for the appointment of counsel is insufficient and the evidentiary hearing did not invoke the Ivey right to counsel. Finally, in Benchoff v. Commonwealth, Ky., 657 S.W.2d 234 (1983), counsel was denied an indigent prisoner merely because the language of the enhancement charge was "involuntary manslaughter," a technicality which was insufficient to constitute a specific request for counsel.

Whether the appointment of counsel in post-conviction proceedings is discretionary, as in the federal system, or an obnoxious detail in technicalities as it is in Kentucky, both were not entitled for the indigent and/or

 undisputed as unconstitutional barrier to relief, both approaches inevitably discriminate between rich and poor, the illiterate and educated. This group of people is perhaps the most persuasive argument for the assistance of counsel in the prison setting.

The Bounds right of access to the courts, obviously requires access to implement, materials and the mails for its exercise. Early on, the United States Supreme Court recognized that due process and equal protection prevented the raising of financial obstacles to an indigent inmate's assertion of post-conviction remedies, in Smith v. Bennett 356 U.S. 706 (1958), the court concluded that requiring an indigent prisoner to pay a four dollar statutory filing fee, before being allowed to pursue a petition for habeas corpus in state court, denied the prisoner equal protection of the laws. But financial obstacles still face the indigent prisoner that can dangerous limit the opportunity for them to present their claims in court, while indigency is defined by federal and state statute and interpreted on a case-by-case basis upon the prisoners entire financial picture, corrections officials have opted for a clear-cut rule. The federal standard is found in Atkins v. Evert, DuPont de Nemours and Company, 335 U.S. 321, 339 (1948). There the Supreme Court defined indigency as "persons who cannot pay or give security for the legal process and deficiencies in indigency itself is insufficient to constitute a specific request for counsel.

Johnson v. Avery, supra, at 487, pointed out that in 1967 82 percent of all prisoners had not completed high school, while 55 percent had not finished the eighth grade, in a more recent study, Walmsley, 536 F.Supp. 1350 (W.D. Fl. 1982), rev'd, No. 84-2756 (11th Cir, 1985), Notes pending, the District Court held that the state was constitutionally required to provide for attorney assistance to prisoners for the filing of civil actions. Raising its decision on Bounds v. Smith, supra, and expanding Bounds by criticizing the Supreme Court's notion that mere access to law libraries is a sufficient method to assure meaningful access to the courts, after three lengthy evidentiary hearings, the MOOKS have held that the state was generally unable to understand legal materials, 16, 1543, were generally illiterate, 16, 1337-38; and were seldom able to attain a college level reading ability, 1G; and, most "jailhouse lawyers" were ineffective. 10. The Court concluded that no adequate means existed to assure effective access to all prisoners without attorney assistance. For, in reversing holding that there is no automatic constitutional right to legal representation in federal habeas corpus proceedings, although a motion for reharing is pending, sooner or later the Supreme Court will have to face this issue and decide the parameters of meaningful court access.

Any attorney that assists prisoners is frustrated by the procedural nightmares of pro se fillings; by inmates who insist on pursuing frivolous claims; and, by the way handling of meritorious applications for relief, some of which are permanently lost, and the loss of a meritorious claim, that erroneous deprivation, that best demonstrates the constitutional right of attorney assistance, when one examines the constitutional contours of the Bounds right of access, is easy to see why meaningful access requires attorney assistance.

A prisoner has two interests when seeking to collaterally attack a conviction an underlying grievance that he wishes to remedy, and a separate interest in the finality of the conviction. If he goes to court, it is that latter interest that serves as the foundation for the right of access, Access...
Sixth Circuit Highlights

Confessions of Non-Testifying Co-Defendants

In Marsh v. Richardson, F.2d, 15 SCR 3 at 9 (January 23, 1986), the Sixth Circuit Court of Appeals reversed the District Court's denial of habeas corpus relief due to the improper admission of an out-of-court statement made by a non- testifying co-defendant. This reversal was ordered even though the co-defendant's statement on its face did not incriminate Marsh and the trial court admonished the jury to consider the co-defendant's statement only against him and not against Marsh.

The Sixth Circuit noted that under United States v.值on, 391 U.S. 351 (1968), the critical factor in determining if a Confrontation Clause violation occurred when a confession of a non-testifying co-defendant was introduced at a joint trial was whether there was a substantial risk that the jury looked to the statement in question in determining the defendant/petitioner's guilt. In assessing whether such a substantial likelihood exists, the contested statement, its incriminatory nature and its role in the case figure prominently. The Court stated that in determining the incriminatory effect of the co-defendant's statement, it is proper to consider the other evidence beyond the statement itself.

In this case, the circumstantial nature of the contested evidence to the prosecution is both improper and unnecessary.

Thus, in this case, the circumstantial nature of the other evidence and the prosecutor's closing argument use of the co-defendant's statement against the defendant created a substantial risk that the jury would consider that statement against the defendant. The Court stated that permitting the admission of a non-testifying defendant's out-of-court statement in circumstances in which a substantial risk exists that it will be used against the defendant not only denies the Sixth Amendment right to confrontation, but raises serious due process concerns regarding the validity of the conviction and the fundamental fairness of the trial process.

DONNA BOYCE

POLICE CHIEF ORDERS LUNCH IN RESTAURANT, NOT CHURCH

A Nashua, New Hampshire, police officer may not attend church while on his lunch break, because the time off "is for the express purpose of eating, not attending church," the police chief ruled earlier this year.

Officer Fred Williams, a member of the First Church Congregational in Nashua, had stood in the back of church during his break until the ban, which he has appealed to the state's Public Employee Labor Relations Board. The board has not yet set a hearing date for Williams' complaint. Nashua's city attorney, Steven Bolton, said police regulations prohibit officers "from entering a public place while on duty and in uniform, except to perform a police function." The only exception is the lunch break, he said.