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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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Judge Richard Fitzgerald on District Court Practice (See Page 19)
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.

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THE GIDEON'S TRUMPET:
THE PLIGHT OF THE INDIGENT PRISONER

SILENCING GIDEON'S TRUMPET -

Every prisoner dreams the dream of Gideon; a two page pro se handwritten petition filed in the United States Supreme Court is read, believed, and the unjust conviction is reversed. A new trial is had and counsel is appointed, and when brought before the jury once again, there is an acquittal. Then again, in most instances Gideon's dream is just that, a dream. The facts 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 true 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, and 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 forget.

Gideon v. Wainwright, 372 U.S. 335 (1963) (extended the Sixth Amendment right to counsel to the states through the Fourteenth Amendment); Hilaire, there is an absolute right to appointment of counsel, even when indigent, felony cases).

Allison Connely

Slowly but surely the prison walls have been eroded by the public's increasing awareness of the sad 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 prison system has poor and indigent, the uneducated and illiterate, equally, is ludicrous. Money still talks, and for those who have few with a medium of education, at least if 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 Hull, 312 U.S. 546 (1941). Yet, in exercising the right of access to the courts, it is the indigent and uneducated who 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 a transcript, and/or help the inmate draft initial pleadings and motions gain the court's hearing. It means that all prisoners here at least one avenue available for discussing the merits of their case and for obtaining advice in ongoing procedural problems. Moreover, where a meritorious issue is presented, the attorney may undermine the full presentation 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 appeal process. 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 dockets, trial motions, indictments, or final judgments; nor do they have funds and/or the necessary education to obtain them. Many times, their inartful requests to the clerks and courts are ignored or slurred-stood. Perhaps the most crucial 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? Do they 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 of one's trial. Yet, until this error are presented, the attorney may not read a transcript, search for potential errors that might be presented in a post-conviction proceeding, to aid in the preparation of a federal habeas petition. Mayer v. Chicago, 404 U.S. 189 (1971). Rather, prisoners must first specifically state their claims and legal issues in a collateral petition and then show a particularized need for the transcript to prove entitlement.

The bright line when brought before the courts, must be delineated in the collection of evidence before a pleading is even filed. Most prisoners do not have copies of their court dockets, trial motions, indictments, or final judgments; nor do they have funds and/or the necessary education to obtain them. Many times, their inartful requests to the clerks and courts are ignored or slurred-stood. Perhaps the most crucial 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? Do they even possess the knowledge to identify a legal error, and should they be expected to?

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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 in the federal system, appointment of counsel is discretionary, 28 U.S.C. § 1915(d), 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(1) and RC 11.42(5) provides for the appointment 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 PTO conviction. Thus, an indigent prisoner is not entitled to the appointment of counsel in preparing a post-conviction petition if he is not 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 indigent 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 of appointed counsel in post-conviction proceedings. Allen v. Commonwealth, Ky., App., 686 S.W.2d 356 (1984), held that a written request for the appointment of counsel "at no expense of the court" was not a request for counsel. The evidentiary hearing did not involve the Ivey right to counsel, finally. In Beecher v. Commonwealth, Ky., 657 S.W.2d 234 (1983), counsel was denied an indigent prisoner merely because the language of the post-conviction affidavit of indigency was insufficient to constitute a specific request for counsel.

Whether the appointment of counsel in post-conviction proceedings is discretionary, as the federal courts have held, or by operation of technicalities as in Kentucky, both pose for the indigent and/or undoubted as unconstitutional burden to relitigate, both approaches invidiously discriminate between rich and poor, the illiterate and educated. This Geneva principle 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, 365 U.S. 706 (1961), 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 law. But financial obstacles still face the indigent prisoner that can dangerously limit the opportunity for them to present their claims in court, while indigency is defined by federal and state statutes and interpreted on a case-by-case basis upon the prisoners entire financial picture, constitutional officials have opted for a clear-cut rule.

The federal standard is found in Adkins v. E.I. DuPont de Nemours and Company, 335 U.S. 331, 339 (1948). There the Supreme Court defined indigency as "persons who cannot pay or give security for the costs necessarily incident to the defense of their cause, and who are unable, because of the necessities of life," Kentucky's definition, for the purpose of this action, is derived from the federal statute, 18 U.S.C. § 352, 18 U.S.C. § 3551, 28 U.S.C. § 1915(c), 28 U.S.C. § 3626(b). In Inmates v. Bradley, Ky., 377 S.W.2d 7 (1963), defendants were reversed for denial of counsel and remanded for the purpose of appointing counsel;

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824 (3rd Cir. 1975) compassionately recognized:

We do not think that prisoners...
requires not only that the prisoner have an opportunity to present the claim to the Court, but that the claim receive fair judicial consideration. See Romer v. City of Prichard, 434 U.S. 717 (1978). This does not mean that every claim must be heard on the merits. Rather, it means that the claim must be fairly considered by the courts in its substantive and/or procedural posture. So, if due process requires some degree of judicial consideration of all claims properly presented, that the prisoner has a correlative right to present those facts and issues necessary to obtain fair consideration of his or her claims. A prisoner will be deprived of the right to fair consideration, and thus access, when due to indigency, illiteracy or lack of education, she is unable to present the grievance adequately to the court, so the court can not fully consider the claim on the other words, the right to receive a fair consideration in court, derived from the right of access to the court, creates a barrier to the prisoner's right to an meaningful hearing and proceedings. When one balances the risk of erroneously depriving the prisoner/petitioner of the right of access to the claim and the risk of denying the claim if attorney assistance is denied, against the government's interest in security, punishment, rehabilitation and fiscal objectives, it is clear that without attorney assistance, the court is unable to make fair determination whether a claim is meritorious. Such an argument is bolstered by a study of pro se inmate filings which found that the data indicated that most prisoner pleadings are summarily dismissed. Turner, When Prisoners Sue: A Study of Prisoner 1985 Federal Courts, 92 Harv. L. Rev. 610, n. 149, at 617-21 (1979). Only 4.2 percent of the cases proceeded to trial, id. at 618. More over, the major factor affecting a prisoner's potential to survive summary dismissal has been whether the attorney prepared the prisoner's pleading. id. Another study shows that the dismissal rate of habeas corpus petitions for procedural defects was a sizeable fifty-five percent. See, L. Tasco, Post-Conviction Remedies, 435 n. 16 (1981), suggesting that meritorious as well as frivolous claims are lost. For a general discussion, see, Lin, A Prisoner's Constitutional Right to Attorney Assistance, 83 Columbia Law Review, 1279 (1983).

Providing attorney assistance in the initial stages of collateral review would benefit not only the indigent and uneducated but the courts. Counsel can distinguish good cases from bad and prevent procedural messes and pleomorphic litigation. Despite this rationale, in present law there is no blanket constitutional right of counsel in collateral proceedings. Rather, counsel is not appointed until a prisoner has made a colorable claim for relief. Johnson v. Avery, supra; Commonwealth v. Ivey, supra. Because uneducated prisoners cannot effectively use sophisticated legal materials, and because it is obvious that indigent prisoners do not have the same access to attorneys as their moneyminded counterparts, only a few states have established prison legal services to provide attorney assistance to inmates at the preparation stage of their pleadings. Kentucky is such a state.

ALLISON O'NEILLY

The Bounds decision established a constitutional right entitling prisoners to receive meaningful access to the courts, and the reasonable means that the courts could provide to ensure this access. Bounds v. Smith, 430 U.S. 248 (1977). This right means that prisoners must be provided to the prisoner the same access to the library and extracurricular activities as is available to non-prisoners. Wilkins v. Davis, 978 F.2d 796 (6th Cir. 1992). The United States District Court for the Western District of Kentucky broadly interpreted Bounds and issued a program of attorney assistance for all state penal institutions. In Canterino v. Wilson, 562 F.Supp. 106 (W.D. Ky. 1983), the court found that the inadequacy of available jailhouse lawyers mandated that prison officials provide access to attorneys. The Court stated that the right of access to the Court includes:

For those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, a provision...to allow them to communicate with someone who...is capable of translating their complaints into an understandable presentation, id. at 111.

The same inadequacy was found in Kendrick v. Blount, 566 F.Supp. 1536 (1984), when the prisoner's door shuts, the doors to the courthouse must remain open to all on an equal footing.

As noted, however, that 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 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. The Court cautioned, however, that consideration of the importance of the contested evidence to the prosecution is both improper and unnecessary.

Thus, in this case, the fundamental 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.