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
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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.
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. It is 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 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 forgive.

Allison Connely

Slowly but surely the prison walls have been eroded by the public’s increased 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 dealt the poor and indigent, the uneducated and illiterate, equally, is ludicrous. Money still talks, and for those whose education is few with a medium of expression, 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 Hurl, 321 U.S. 546 (1941). Yet, in exercising the right of access to the courts, it is the indigent and uneducated 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 pleadings, and/or help the inmate draft initial pleadings and motions to 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 upcoming procedural problems. Moreover, where a meritorious issue is presented, the attorney may understate or misrepresent 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 prisons. Yet, 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 indigent unfairness and inevitable discrimination faced by indigents and illiterates confined in penal institutions is redressed.

The strongest 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 heartfelt requests to the clerks and courts are ignored or misunderstood. Perhaps the most critical source of information is the trial transcript. While a financially solvent prisoner can purchase the transcript, this is far beyond the means of the indigent. How then 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 a legal error that might be presented in a post-conviction proceeding, to aid in the preparation of a federal habeas petition, Meyer 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, Black v. Washington, 372 U.S. 467 (1963). The Kentucky courts have fully adopted the decisions of their federal counterparts, see, Glines v. Commonwealth, Ky., 274 S.W.2d 465 (1955); Stintzer v. Commonwealth, Ky., 452 S.W.2d 613 (1970); Gillium 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." In re, at 19. The United States Supreme Court answered such arguments by noting that all justice requires is an adequate opportunity to fairly present one’s claim, and not an absolute equal opportunity to present that same claim, United States v. McGillicutty, 426 U.S. 317 (1976). See also, Gillium 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 held in Brown v. United States, 559 F.2d 455, 459-60 (7th Cir. 1977), the preexisting transcript must be provided free of cost to an indigent federal prisoner for use in a collateral proceeding because by Brent Parker and Johnny Hart
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 a sufficiency test in the federal system, 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 31.101(2) and RCR 11.42(2), although RCR 11.42(2) provides for the appointment of counsel if an evidentiary hearing is required, the statutory requirements of KRS 31.101(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(2) set the minimum standard for appointment of counsel, while the statutory language evidenced a legislative intent to consider indigents' pro se pleadings to avoid the preclusion of a potentially meritorious claim.

However, the expansive reading given by the Ivey Court has been eroded in subsequent case law, In Ray v. Commonwealth, Ky., 633 S.W.2d 71 (1982), Ray sought to attack the underpinnings of his first degree P7O 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 31.101(1) does not provide for the appointment of counsel for one who isn't in detention and not under foreshadowed 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 P7O conviction. Thus, an indigent prisoner is not entitled to the appointment of counsel in preparing a pending 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 the denial of counsel was necessary to prevent an erroneous deprivation of valid grounds for voiding a conviction. Subsequent Kentucky cases have given even more a technical reading to the right of appointed counsel in post-conviction proceedings. Allen v. Commonwealth, Ky., App., 668 S.W.2d 556 (1984), held that a written request for the appointment of counsel "was" or "in" the evidentiary hearing did not invoke the Ivey right to counsel. Finally, in Branden v. Commonwealth, Ky., 657 S.W.2d 234 (1983), counsel was denied an indigent prisoner merely because the language of the statute did not render any evidentiary hearing, and, hence, it 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 obligation for an obvious technicality as in Kentucky, both pose for the indigent and/or

undecided as unconstitutional barrier to relief, both approaches inevitably discriminate between rich and poor, the illiterate and educated. This grave policy question 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. 708 (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. Other indigent 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 standards and interpreted on a case-by-case basis upon the prisoners entire financial picture, correctional officials have opted for a clear-cut rule.

The federal standard is found in Atkins v. Evils, DuPont de Nemours and Company, 355 U.S. 331, 339 (1948). There the Supreme Court defined indigency as "persons who cannot pay or give security for the costs of the session, for in such a case the court may feel it impossible to enhance itself to institute or to prosecute the case of an indigent person..." Atkins, supra. Clearly, this definition requires complete destitution, deprives the inmate of even the simple and most basic amenities and fails to consider the complete financial status, as for example, one's need to support dependents. Surely, this does not comport with the state's process requirements of access to the courts. Certainly, it does discourage prisoner litigation by forcing this destitute individual to be a "Mabon's choice." Still, many courts have held that "prisoners do not have an unlimited right to free proof, but, instead, we have a right to use the underpinnings of the state's definition, for the purpose of arguing Bounds and, under the Constitution, for the purpose of Bounds..." Supra, 355 U.S. 331, 339 (1948).

It is clear that a prisoner who is categorized by Corrections as indigent, cannot hope to compete with wealthier cellmate. The innate legal correspondence to the courts, legislators, and attorneys is severely restricted, while the ability to photocopy pleadings, motions and letters is almost nonexistent, unless one can pay the price. Yet, when compared with other systems across the country, the Kentucky prisoner's right of access to the judicial machinery is far more protected due to the availability of counsel at the penal institutions, federal court rulings, and Kentucky law.

Kentucky correctional officials have established a much more stringent definition of indigency to insure that access to implement, such as copying machines, postage, and other materials is not abused by the "indigent" inmate. For the purpose of judicial access, Corrections' Policy and Procedure 4.4 defines indigent as "inmates who have maintained a balance in their inmate account of five dollars or less for thirty days prior to requesting indigent status," Twynam v. Crisp, 584 F.2d 352 (10th Cir. 1978), supports this policy. Clearly, this definition requires complete destitution, deprives the inmate of even the simple and most basic amenities and fails to consider the complete financial status, as for example, one's need to support dependents. Surely, this does not comport with the state's process requirements of access to the courts. Certainly, it does discourage prisoner litigation by forcing this destitute individual to be a "Mabon's choice." Still, many courts have held that "prisoners do not have an unlimited right to free proof, but, instead, we have a right to use the underpinnings of the state's definition, for the purpose of arguing Bounds and, under the Constitution, for the purpose of Bounds..." Supra, 355 U.S. 331, 339 (1948).

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 account, Amy Wilmarth, 536 F Supp. 1330 (W.D. Fla. 1982), rev'd., No. 84-2756 (11th Cir. 1985), ruled postpending, the District Court held that the state was constitutionally required to provide for attorney assistance to prisoners for the filing of collateral actions. Ruling its decision on Bounds v. Smith, supra, Hooks, et al., v. Kentucky, expanded 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 Hooks court found the state generally unable to understand legal materials, 16, 1534; were largely illiterate, 16, 1337-38; and, "at a college level reading ability," 16, and, most "jailhouse lawyers" were ineffective. 16. The Court concluded that no adequate means existed to insure effective access to all prisoners without attorney assistance. The Court reversed holding that there is no automatic constitutional right to legal representation in federal habeas corpus proceedings. Although a motion for rehearing 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 most needling of meritorious applications for relief, some of which are permanently lost, or, 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: one is an unarticulated grievance that s/he wishes to remedy, and a separate, but related interest in the right of access to the courts. It is this latter interest that serves as the foundation for the right of access, Access
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 a non-testifying co-defendant's 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 the co-defendant's statement only against him and not against Marsh.

Sixth Circuit Highlights

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," Nashua's 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.

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