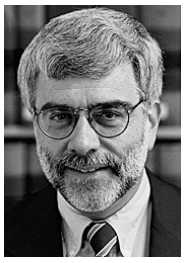
SINCE 1854

Chicago Daily Law Bulletin®

Volume 157, No. 114 Friday, June 10, 2011

Supreme Court addresses a Kafka-esque situation



Criminal Procedure

By Timothy P. O'Neill

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This year marks the 50th anniversary of the publication of Joseph Heller's classic novel "Catch-22."

Do you remember the incident in the book that spawned the concept of catch-22? If not, let me remind you.

Yossarian, the novel's indigent protagonist, is convicted of a felony. He tells the judge that he wants his appointed attorney on direct appeal to raise the issue that his trial attorney failed to contact five alibi witnesses Yossarian told him about.

"Can't do it," the judge told him. "You will need evidence outside the trial record to show your trial attorney failed to contact the witnesses. The direct appeal can only deal with issues that appear in the trial record. So that issue can't be raised by your lawyer in your direct appeal."

"OK," Yossarian said. "Tell me how to raise it."

"You have to file a post-conviction petition."

"So who is the lawyer you are going to appoint to help me file the post-conviction petition?"

"Nobody. The Supreme Court says you have no right to an appointed attorney to help you file a post-conviction petition."

"OK," Yossarian said. "But you did appoint me a lawyer for direct appeal. So I'll have him do it."

"You can't do that," the judge said. "The lawyer we appointed for you can only deal with issues that appear in the trial record."

"So appoint me a lawyer for the post-conviction."

"I just told you why I can't do that."

"I don't understand any of this," Yossarian said.

"Hey," the judge said, smiled. "It's what we call catch-22."

Now do you remember?

Wait a minute. … my mistake. The Kafka-esque situation I just described was not invented by Joseph Heller. It's actually the holding of the Illinois Supreme Court in a recent case called *People v. Ligon,* 239 Ill.2d 94 (2010).

But relief may be on the way. On Monday, the U.S. Supreme Court agreed to review whether this holding is not only unfair but actually unconstitutional. The case the court agreed to review is *Martinez v. Ryan*, No. 10-1001, a 9th U.S. Circuit Court of Appeals case out of Arizona that is on all fours with *Ligon*.

Let's start with some background.

An indigent defendant accused of a felony has a Sixth Amendment right to an appointed attorney. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel applied to states through the 14th Amendment due process clause).

How about appointed counsel on a direct appeal? The Sixth Amendment only applies to "criminal prosecutions" and a prosecution ends at sentencing. But the U.S. Supreme Court nevertheless found that a combination of the due process and equal protection clauses of the 14th Amendment guaranteed appointed counsel for the first direct appeal as a matter of right. *Douglas v. California,* 372 U.S. 353 (1963).

How about appointed counsel to help an appellant obtain discretionary review from a state Supreme Court or the U.S. Supreme Court? Here the U.S. Supreme Court drew the line and found no constitutional right. *Ross v. Moffitt,* 417 U.S. 600 (1974). The court noted that at this point in the criminal proceedings a defendant had been provided with trial counsel, a trial transcript (*Griffin v. Illinois,* 351 U.S. 12 (1956)), appellate briefs and the appellate opinion. This work product would provide sufficient information for a higher court to decide whether to review the case. *Ross* emphasized that the role of either the state Supreme Court or the U.S. Supreme Court is not to correct errors, but rather to review cases where a matter of public interest was at stake, a significant legal principle was involved or a conflict with precedent existed.

The policies behind *Douglas* and *Ross* collided in *Halbert v. Michigan*, 545 U.S. 605 (2005). Michigan provided that all convicted criminal defendants were permitted automatic direct appellate review of their convictions with one exception: Defendants who pled nolo contendere or guilty. These latter defendants could obtain appellate review only by leave of the court. The issue in *Halbert* was whether defendants who either pled nolo or guilty had a constitutional right to the appointment of counsel to assist them in their petitions asking the appellate court to allow them to have their cases heard on appeal.

The state argued that *Ross* controlled. *Ross* held that there was no constitutional right to counsel to ask an appellate court to grant discretionary review. The state argued that since this is exactly what Halbert was requesting from the state appellate court, *Ross* would support a decision finding no constitutional right to counsel.

The U.S. Supreme Court rejected this and held instead that *Douglas* controlled. It did so for two reasons. First, the decision of the Michigan Appellate Court whether or not to allow such an appeal was merits-driven. Unlike the discretionary review decisions in *Ross* based on public policy reasons, the Michigan Appellate Court's decision here would be motivated by whether an error occurred in the particular case at bar. And this consideration led to the second major difference from *Ross*: The pro se defendants in the Michigan system were woefully ill-equipped to effectively argue the merits of their cases. *Ross* was partly predicated on the arsenal

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of tools that had already been provided to defendants seeking discretionary review from supreme courts. *Halbert,* however, concerned defendants seeking "first-tier review." The Supreme Court thus held that Halbert had a constitutional right to counsel to assist him in asking the Michigan Appellate Court to review his case.

And this brings us to the *Ligon* case. An indigent Illinois defendant has neither a constitutional nor statutory right to the appointment of counsel to prepare a post-conviction petition at the summary-dismissal first stage of the proceedings. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); 725 ILCS 5/122-2.1(a) (2), 122-4. Nonetheless, Illinois compels him to raise an ineffective assistance of trial counsel claim that requires evidence outside the record in a post-conviction petition. Since ineffective assistance of trial counsel is a merits-driven issue that is receiving "first-tier review," Ligon argued that *Halbert* should control and that he had a federal constitutional right to appointed counsel to prepare his post-conviction petition.

The Illinois Supreme Court disagreed. Relying on *Martinez v. Schriro,* 623 F.3d 731 (9th Cir. 2010) — the same case the U.S. Supreme Court just granted cert. sub nom. *Martinez v. Ryan* — the court found no constitutional right to counsel. Agreeing with Martinez, the Illinois Supreme Court held that Ligon's case was more similar to *Ross*. Like *Ross*, Ligon had been appointed counsel for his first direct appeal. Like *Ross*, he was armed with a transcript, briefs and an appellate court opinion to assist him. Finally, Ligon merely had to convince a court at this first stage of the post-conviction process that he had "the gist of a constitutional claim."

But the problem, of course, is that by definition an outside-the-record claim of ineffective assistance will not be aided by arguments made from the record. So you are forcing a layperson to prepare an argument for a "first-tier review." The idea that a layperson should have no trouble constructing an argument raising "the gist of a constitutional claim" seems, at the very least, disingenuous.

So is *Martinez* closer to *Ross* or more like *Douglas* and *Halbert?* I don't know about you, but I'm hoping the U.S. Supreme Court sees the whole situation as being closest to Capt. John Yossarian.