COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
CASE NUMBER 2009-SC-000768
(2007 –CA- 001685)



WILLIAM D. GOLDSMITH — APPELLANT

v.

APPEAL FROM HICKMAN CIRCUIT COURT
HON. TIMOTHY A. LANGFORD, JUDGE
INDICTMENT NO. 07-CR-00001

COMMONWEALTH OF KENTUCKY — APPELLEE

# BRIEF FOR APPELLANT

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## CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this 22nd day of November 2010: Hon. Timothy G. Langford, Judge, Hickman Circuit Court, Courthouse, 114 E. Wellington Street, P.O. Box 167 Hickman, Kentucky 42050; Hon. Mike Stacy, Commonwealth's Attorney, P.O Box 788, Wickliffe, Kentucky 42087; Hon. James B. Mills, Assistant Public Advocate, Department of Public Advocacy, 400 Park Avenue, Suite B, Paducah, KY 42001; and served by messenger mail to the Hon. Jack Conway, Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal was returned to the custody of the Clerk of the Court of Appeals of Kentucky.

JULIA K. PEARSON

## INTRODUCTION

At Dustin Goldsmith's probation revocation hearing, after Goldsmith cursed, the trial court employed a "hammer clause" in Goldsmith's plea agreement and sentenced him to five years, the maximum possible for each of three counts of Possession of a Forged Instrument, to be run consecutive to each other and consecutive to a similar sentence in Carlisle County. This Court granted Goldsmith's Motion for Discretionary Review of the court's revocation hearing and his sentence.

## STATEMENT AS TO ORAL ARGUMENT

Mr. Goldsmith welcomes oral argument if it allows this Court to reach a fair and just result.

## STATEMENT CONCERNING CITATIONS

The record in this case consists of one volume of Transcript of Record and one videotape. The supplemental record in this case consists of one videotape. Citations to the Transcript of Record shall be TR page number. Citations to the videotape shall be VR; date; time stamp. Citations to the supplemental videotape shall be VRS; date; time stamp.

## STATEMENT OF POINTS AND AUTHORITES

## STATEMENT OF THE CASE

At first blush, this case appears to be about a simple probation revocation. That is an incorrect conclusion. The trial court decided that a just sentence for three counts of Criminal Possession of a Forged Instrument would be five years consecutive on each count, for fifteen years. As the Court of Appeals said in its opinion,

> [w]hile the legislature made this maximum sentence possible under the criminal code, there must be some **rational discretion used by the court.** Indeed, the court should have the necessary inherent sense of justice to determine the gravity of the offense, and to make the punishment fit the crime. In Goldsmith's case, the court apparently knew the sentence to be outsized, but, nevertheless, imposed it.

*Goldsmith v. Commonwealth*, 2009 WL 3399662, *6 (October 23, 2009)[1]; emphasis added.

The case began on January 17, 2007, when 18-year-old Dustin Goldsmith was charged, in an information, with three counts of Criminal Possession of a Forged Instrument. All of the checks had been written on the checking account of the deceased grandmother of his girlfriend, Carrie Moore. *Id.*, at *1. The amount of all three checks totaled $150. VR; 3/1/2007; 10:46:54.

On February 15, Goldsmith was arraigned and pled guilty. Defense counsel told the court that he "[and the government] had a plea agreement worked out and we can do a wholesale deal today." VR; 2/15/2007; 10:03:18. Counsel also informed the court that he was "just coming in on this case" and did not recall seeing discovery from the government. *Id.*, 10:04:32. The plea offer was one year consecutive for each count, for a total of three years. *Id.*, 10:07:15. Goldsmith informed the court that he had committed the crimes in both Hickman and Carlisle County because he was addicted to drugs. *Id.*

[1] A copy of this unpublished case is provided pursuant to CR 76.28(4)(c).

The record does not indicate whether Carrie Moore was also addicted. The record also does not show any sort of discussion between Mr. Goldsmith and his counsel.

Just thirteen days after that, on March 1, 2007, the trial court held Dustin Goldsmith's sentencing hearing. He celebrated his nineteenth birthday three days before. *Goldsmith, supra*, at *1, fn 3. Goldsmith had been appointed counsel, pled guilty and sentenced all within 42 days. The record of this hearing shows a discussion between counsel and Mr. Goldsmith regarding the terms of his probation from VR; 3/1/2007; 10:52:39 to 10:55:13. Defense counsel asked for probation, which the government opposed. The government counter-offered with jailing Goldsmith and at an appropriate time, considering a motion "where he could be shocked to a program where he could have a chance for a future." *Id.*, 10:48:02.

The trial court increased the ante when it refused to agree to immediate probation, but said it would probate Goldsmith to a drug treatment program if, in return, Goldsmith agreed to five years consecutive on each charge for a total of fifteen years if he were unable successfully to complete his probation. *Id.*, 10:48:40.

"Despite the Commonwealth's vocalized trepidation, and with woefully inadequate time for consultation with counsel," Mr. Goldsmith agreed to and was sentenced to the trial court's model: probation to a religious drug rehabilitation program with five years to serve on each count, to be served consecutively if Goldsmith were to fail to complete the program. *Goldsmith, supra*, at *1.

The panel commented on the "woefully inadequate time" in this manner:

> The record reflects that less than three minutes passed between the time the plea agreement was discussed with the court and the time of acceptance by Goldsmith. The majority of Goldsmith's counsel's advice is audible on the record. At no time during this brief discussion between

> attorney and client is there any mention of the potential dire consequences of this course of action.

*Id*, at fn 1. In the afternoon of the same day, the same trial judge gave Mr. Goldsmith the same sentence, probation or failing that, fifteen years, in his Carlisle County case. VR; 3/1/2007; 10:49:49. Goldsmith began treatment at LifeLine Ministries, a church-based rehabilitation program.

Just about three months later, the court held a hearing on whether Dustin Goldsmith had violated the terms of his probation when he was dismissed from LifeLine Ministries because he had allegedly used his cell phone to text Moore more than one hundred times. New counsel had been appointed at an abbreviated hearing held on June 7, 2007. At the July 5, hearing, counsel essentially stipulated to Goldsmith's probation violations. The trial court entered into the fray with the following exchange:

> Court: So you were well aware that you had to complete their program, you couldn't just violate the rules, weren't you?
>
> Goldsmith: I didn't know that rehab was church-based rehab. **Y'all just rushed me into that.** I wasn't ready for that.
>
> Court: You mean you didn't want to go to that rehab?
>
> Goldsmith: Nobody told me nothing about it. **I figured I was going there to get help.** All it is, is like church. That's all it is.
>
> Judge: It didn't help you any?
>
> Goldsmith: No, sir.

VR; 7/5/2007; 11:32:52; emphasis added.

After argument about sentencing, the trial court noted that Goldsmith had stipulated to violating his probation and then said:

> Really thought I would, Mr. Goldsmith, but an answer of 'no excuse' would have been a whole lot better than you telling me that its church

based. I can't imagine that anything up there was designed to hurt you or inflict anything on you other than help. Those words make me want to run this consecutive.

*Id.* Dustin Goldsmith's "excuse" that he believed LifeLines treatment was not helping him because it was "church based," rather than saying he had no excuse for his behavior, "ma[d]e" the judge "want to run [his sentences] consecutive." However, the court did not mean that only the three five year sentences for the Hickman County charges would run consecutive for a total of fifteen years. The court clearly wanted those sentences to run consecutive to each other and consecutive to his fifteen year sentence in Carlisle County. Then the following occurred:

Goldsmith: Fuckin'[2] do it.

Judge: What say, son?

Goldsmith: I said do it.

. . . .

Defense counsel: Sir I would just-again, I understand the Court's made its decision but again, thirty years for this is unduly harsh.

. . . .

Judge: I think you're right but your defendant's attitude is not the best in the world and once he wants to come back, I'll be glad to look at it another day but **today, it's going to be consecutive for a total of thirty years in the penitentiary consecutive with Carlisle County 07-CR-001.** Give you a little time to think about that Mr. Goldsmith. You may decide you want to ask for help again, I'll be glad to hear from you, the door's not shut to that. But you best work on a little attitude adjustment between now and then.

Defense counsel: Yes, sir.

Goldsmith: Maybe you all should work on your little doings.

Prosecutor: Mr. Goldsmith, please be quiet. Be quiet.

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[2]Other references to this swear word will be to f**kin'.

> Goldsmith: I thinks it's pretty crappy you are gonna give me thirty years for f**kin' getting kicked out with a cell phone. That's f**kin' crazy.
>
> Judge: Sheriff, remove the defendant from this courtroom.

*Id.*; emphasis added.

A little over two weeks later, defense counsel moved to reconsider the unduly harsh sentence. Mr. Goldsmith was not present at this hearing. When counsel said he had filed the motion, the court noted that Goldsmith had cursed and immediately overruled the motion. VR; 7/19/2007; 11:34:48. Apparently thinking better of that tactic, the court asked if defense counsel had anything to say. Counsel "reiterate[d] that thirty years for three class D felonies is unduly harsh." The court replied:

> **The court will say on the record that you are 100% right.** An idiot. **But I know if you could tell me some way I could punish him for his outburst in the courtroom other than that, I'll be glad to consider it.** But the problem I've got is that young man sat over there with me having the word concurrent all but written on a piece of paper and he convinced me to consecutive. He was gonna say whatever he wanted to say and if he didn't hear what he wanted to hear he was gonna take it out on everybody. He can curse in front of me all he wants to, other than respect for this bench but when he starts doing it in front of my clerks and everybody else in this courtroom, that's a whole different ballgame.
>
> . . . .
>
> You got longer. You still got some 110 days to file this motion. You may convince me later to do something for him cause I agree with you, thirty years is too harsh. But, it's also too fresh in my memory what he sat right over there and did last time. Overruled.

*Id.*, 11:34:52; emphasis added.

Trial counsel did not file any other motions. On appeal, Goldsmith argued that the trial court denied the minimal due process requirements he was entitled to he was entitled

to and that the trial court ignored the fact that it had contempt abilities for Goldsmith's outburst in the courtroom.

The Court of Appeals held the minimal due process argument was unpreserved and that no palpable error was to be found. As to the second argument, the panel agreed that the trial court had contempt abilities, but that its choices as to sentencing were fairly limited: either impose the fifteen year sentence or continue Mr. Goldsmith's probation. *Goldsmith v. Commonwealth*, 2009 WL 3399662, at 5.

However, the Court was troubled at the outcome of this case, for several reasons, "not the least of which is the disproportionately harsh sentence." *Id.*, at 6.

> The record reflects that Goldsmith received minimal guidance from his attorney in reference to his initial stipulation to the revocation. Further, the court imposed an overly harsh sentence. . . .Even the trial court, when later denying the motion to reconsider, deemed the sentiment that the sentence was unduly harsh, '100% right.' What is truly confounding is that the trial court seemed not to remember that it was the trial court who constructed this sentence. **While the legislature made this maximum sentence possible under the criminal code, there must be some rational discretion used by the court. Indeed, the court should have the necessary inherent sense of justice to determine the gravity of the offense, and to make the punishment fit the crime.** In Goldsmith's case, the court apparently knew the sentence to be outsized, but, nevertheless, imposed it.

*Id*; emphasis added.

This Court granted Mr. Goldsmith's Motion for Discretionary Review on June 9, 2010.

## ARGUMENT

### I.

### The trial court abused its discretion when it sentenced Dustin Goldsmith in an unduly harsh manner.

#### Preservation

Preservation will be noted within the various subparts.

### A. The "counsel" Dustin Goldsmith received was inadequate.

#### Preservation

Although this subpart was not specifically addressed in Mr. Goldsmith's briefing in the Court of Appeals, the panel addressed the issue in its Opinion, saying:

> The record reflects that less than three minutes passed between the time the plea agreement was discussed with the court and the time of acceptance by Goldsmith. The majority of Goldsmith's counsel's advice is audible on the record. At no time during this brief discussion between attorney and client is there any mention of the potential dire consequences of this course of action.

*Goldsmith*, 2009 WL 3372404, *1, at fn 1. Should this Court find this subpart inadequately preserved, in *United States v. Cronic*, 466 U.S. 648 (1984), the United States Supreme Court held that circumstances surrounding a trial may be such that one claiming a denial of the right to counsel should not be required to show the prejudice resulting from that denial. "[T]here are... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.*, 466 U.S. at 658. In further explanation, the Court said, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself unreliable." *Id.*, at 659.

**Dustin Goldsmith's three minute conversation with his counsel at the sentencing hearing included no discussion of the outcome of his failure to complete probation; moreover, he was not represented by counsel at the June 7 hearing.**

On February 16, Dustin Goldsmith was arraigned and pled guilty to three counts of Possession of a Forged Instrument for charges in Hickman County. "[A] 'package deal' had been worked out resolving" both this case and one in Carlisle County, also concerning bad check charges, also with Goldsmith's girlfriend. *Goldsmith v. Commonwealth*, 2009 WL 3372404, *1. Counsel had a three minute conversation with Goldsmith at his March 1 sentencing. "The majority of Goldsmith's counsel's advice is audible on the record. At no time during this brief discussion between attorney and client is there any mention of the potential dire consequences of this course of action." *Id.*

On May 22, 2007, Eric Meshew, a Probation and Parole Officer, filed a notice that Mr. Goldsmith had been dismissed from LifeLine, the religious drug rehab center, for "non-compliance" because he had been found in possession of a cellular phone. TR 34. Although the trial court "passed" the June 7, 2007, revocation hearing to July 5, 2007, what happened between the time the court called the case and it appointed counsel, who requested time to talk to his client, more resembled a revocation hearing than a simple matter of passing a case.

Presumably, while reading Mr. Meshew's report, the court asked the unrepresented and uncounselled Dustin Goldsmith, "[y]ou got kicked out of some kind of drug treatment program?" VR; 6/7/2007; 10:55:39. When Goldsmith responded that he had, the court said, "[y]ou mean to tell me you had a cell phone and they told you not to have it and you had it?" *Id.*, 10:56:10. The uncounseled, unrepresented Goldsmith

responded, "I don't think that rehab was for me. It rushed into religion too fast for me." *Id.*

While the uncounseled, unrepresented Goldsmith stood in front of him, the trial court continued reading the report, and engaged in the following discussion:

> Court: A hundred and forty-eight times? Why would you call anybody 148 times in four days?
>
> Goldsmith: Why would she call me?
>
> Court: How many times did she call you?
>
> Goldsmith: I erased all of them because I didn't want him finding out.

*Id.*, 10:56:46. The court continued that the "probation order" was that Goldsmith was "to have no contact" with Carrie Moore. Goldsmith responded that he was "not guilty of that, sir." *Id.*, 10:57:17.

Finally, three minutes after it began asking questions of an unrepresented client, the court asked, "[w]ho's your lawyer?" Goldsmith responded, "[m]e, I guess." *Id.*, 10:58:08. After being told that "Mr. Howe," a DPA conflict counsel, had represented Goldsmith at his arraignment/guilty plea/sentencing, the court looked around the room and, spying a DPA lawyer, said, "Mr. Mills? Are you prepared to argue his case or do you or your office need time to look it over?" *Id.* The court then passed the case. The court's questioning was improper and prejudiced the uncounseled, unrepresented Dustin Goldsmith.

*Gideon v. Wainwright*, 372 U.S. 355 (1963) is the seminal case that firmly and incontrovertibly establishes an accused person's right to representation in matters that have the potential in ending in the defendant's incarceration. Precedent stemming from *Gideon*, *supra*, has further articulated the concept that in a criminal proceeding, a

defendant has a Sixth Amendment right to counsel if he is subjected to a potential loss of liberty as a result of those proceedings. *Argersinger v. Hamblin*, 407 U.S. 25 (1972), *Scott v. Illinois*, 440 U.S. 367 (1979), *Alabama v. Shelton*, 535 U.S. 654 (2002).

This Court has consistently recognized the right to counsel. In *Hill v. Commonwealth*, this Court said:

> The right to counsel is protected by the Sixth Amendment to the United States Constitution and was firmly established in the seminal case, *Gideon v. Wainwright*, 372 U.S. 355, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Section 11 of the Constitution of Kentucky independently recognizes the importance of counsel to assist the defendant in a criminal trial. We have held that '[t]he right to counsel is a fundamental constitutional right.' *Jenkins v. Commonwealth*, 491 S.W. 2d 636, 638 (Ky. 1973).

125 S.W. 3d 221, 225 (Ky. 2004).

Both the ABA and NLADA standards mandate that defense counsel has a duty to provide quality representation of his client and to render effective and quality representation. *See* ABA Standard 4-1.2; NLADA Guideline 1.1. A part of those duties is to develop facts which will assist the client during plea negotiations and at sentencing. NLADA Guidelines 6.1, 6.2, 8.7. But nowhere in the three minute conversation counsel had with Dustin Goldsmith at the sentencing hearing is a discussion of the consequences should he fail to complete his probation in any way: 1) that he could be sentenced to five years for each of the three counts, to be run consecutive for a total of fifteen years; and 2) that since the "package deal" had been worked out in Carlisle County (one over which the same trial court presided), a maximum sentence in that case (3 counts X 5 years each=15 years, if run consecutive to each other) could be run consecutive to the sentence in this case, which meant Goldsmith faced a possible thirty year sentence.

The court's questioning of an unrepresented Dustin Goldsmith at the June 7

hearing was also improper. In *Hunt v. Commonwealth*, 2010 WL 3374402, *1 (rendered August 26, 2010)[3], this Court considered a probation revocation hearing originating out of the same trial court in the same county. Cameron Hunt had pled guilty to one count each of Fleeing and Evading in the First Degree and Wanton Endangerment in the First Degree, both of which are Class D felonies. Hunt was arrested on unrelated charges and the court held a revocation hearing on September 20, 2007, just months after the proceedings in this case.

Unlike in this case, "[t]he court appointed a public defender to represent Hunt just prior to the beginning of the hearing." The court then conducted a hearing similar to the one in this case. *Id.* On discretionary review, Mr. Hunt raised the issue that his counsel had been appointed just prior to the beginning of the hearing.

This Court found that although "[t]he United States Supreme Court has declined to adopt a per se right to counsel in probation revocation hearings," "probationers in Kentucky have a statutory right to counsel at a revocation hearing." *Id.*, at *2, citing *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973); KRS 533.050(2). This Court found that Hunt's "short consultation with an attorney the morning of the revocation hearing was inadequate" and his due process rights were violated. *Id.*

If Hunt's due process rights were violated by a "short consultation" with an attorney just moments after she was appointed to represent him, certainly Dustin Goldsmith's rights were violated when the trial court did not even appoint him counsel until **after** he had asked enough questions to cause Goldsmith to admit violating rules of his probation, without having the advice of counsel as to how he proceed.

[3]This case became final on September 10, 2010. A West Reporter volume and page number have not yet been assigned. A copy of this case is in the Appendix.

Dustin Goldsmith's rights under the Sixth and Fourteenth Amendments to the United States Constitution and §§2, 11 and 17 of the Kentucky Constitution were violated. He requests remand for a fair revocation hearing.

## B. The revocation hearing did not comport with even minimal due process.

### Preservation

On appeal, Mr. Goldsmith argued that the trial court violated minimal due process requirements necessary for revocation hearings. The panel found this argument unpreserved and that no palpable error was to be found. *Goldsmith*, *supra*, 2009 WL 3399662 at *4-5.

However, in *Martin v. Commonwealth*, this Court found that a palpable error is one which results in "'manifest injustice,' i.e. a 'probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law.'" 207 S.W.3d 1, 3 (Ky. 2006). In this case, the sentencing error is one which is "so fundamental" that it not only threatened but also defeated Dustin Goldsmith's right to due process of law and fair sentencing. *See also Hunt v. Commonwealth*, 2010 WL 3374402 (rendered August 26, 2010).

Abuse of discretion is defined as conduct by a court that is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky.1999), citing 5 Am.Jur.2d Appellate Review § 695 (1995); *see also Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994). After Dustin Goldsmith told him that religious-based drug treatment was not working, the trial court's decision was "arbitrary, unreasonable, unfair and unsupported".

**The trial court shifted the burden of proof to Dustin Goldsmith.**

At the July 5, 2007 revocation hearing, defense counsel "stipulated" to the charges. The trial court then expressed its desire to have Dustin Goldsmith show cause why he should not be sentenced to the maximum sentence. The Court asked "[s]o you were well aware that you had to complete their program; you couldn't just violate the rules, weren't you?" Goldsmith answered that because "y'all rushed me into" it, he did not know rehab "was church-based," nor was he "ready for that." Goldsmith said he was ready to go to rehab ("I figured I was going there to get help"), but that when he got to LifeLine, "[a]ll it is, it's like church" and provided him no assistance. VR 1; 7/5/2007; 11:31:52.

The trial court noted that Goldsmith had stipulated to violating his probation and when it mentioned the texts to his co-defendant, which were part of the reason for his dismissal from LifeLine, Mr. Goldsmith informed the court that he had been found not guilty of that charge in Carlisle County. *Id.*, 11:33:25. The court then said, "an answer of 'no excuse' would have been a whole lot better than you telling me that its church based." The court told Mr. Goldsmith it had been "[p]repared" to run his sentence concurrent with that in Carlisle County **until** Mr. Goldsmith said he believed a church-based rehab was not enough to help with his drug problem. The court told Goldsmith that it did not "believe anything up there was intended to hurt you. . . .Those words make me want to run this consecutive." *Id.*, 11:36:34.

At that point, in a display of nineteen-year-old hubris, Goldsmith told the trial court "f**kin' do it." Defense counsel reminded the court that "thirty years for this is unduly harsh." The court's response was:

> [Y]our defendant's attitude is not the best in the world and once he wants to come back, I'll be glad to look at it another day. But today, it's going to be consecutive for a total of thirty years in the penitentiary consecutive with Carlisle County 07-CR-001. Give you a little time to think about that, Mr. Goldsmith. You may decide you want to ask for help again, I'll be glad to hear from you, the door's not shut to that. But you best work on a little attitude adjustment between now and then.

*Id.*

The court's requirement that Goldsmith show cause why his sojourn at Lifeline Ministries was not successful was improper. While a 'show cause' standard is perfectly appropriate in a situation that involves civil contempt or when an appellate lawyer fails to timely file a brief with this Court, the 'show cause' standard is inappropriate for the revocation of probation.

In *Hunt v. Commonwealth*, the trial court said it was present for a hearing at which Hunt must "show cause why he shouldn't be revoked". 2010 WL 3374402, at *2. On appeal, this Court held that:

> [a] 'show cause' standard of proof turns a probation revocation hearing into an inquisition, where the probationer is asked to refute the allegations made by the Commonwealth. While the standard of proof is lower for probation revocation than for the original criminal proceeding, the Commonwealth is still required to prove its case.

*Id.*

Just as in *Hunt*, the trial court required Dustin Goldsmith to "show cause" why he should not be revoked. Just as in *Hunt*, the revocation hearing in this case was an inquisition and did not comport in any way with minimal standards of due process. His rights under the Fourteenth Amendment to the United States Constitution and §§2 and 11 of the Kentucky Constitution were violated. Dustin Goldsmith requests remand.

## C. The trial court's use of a "hammer clause" violated the Separation of Powers doctrine.

### Preservation

Sentencing issues are one of the few which cannot be waived in an unconditional guilty plea, especially where the Appellant, as does Mr. Goldsmith, alleges that the sentence was contrary to statute and/or otherwise infirm. *Windsor v. Commonwealth*, 250 S.W.3d 306 (Ky. 2008); *Ware v. Commonwealth*, 34 S.W.3d 383 (Ky. App. 2000); *Hughes v. Commonwealth*, 875 S.W.2d 99 (Ky. 1994).

Moreover, in its Opinion, the panel was troubled at the outcome in this case, for several reasons, "not the least of which is the disproportionately harsh sentence." *Goldsmith, supra*, at 6.

> Even the trial court, when later denying the motion to reconsider, deemed the sentiment that the sentence was unduly harsh, '100% right.' What is truly confounding is that the trial court seemed not to remember that it was the trial court who constructed this sentence. . . .In Goldsmith's case, the court apparently knew the sentence to be outsized, but, nevertheless, imposed it.

*Id.*; (emphasis added).

### The trial court's ruling in both the Hickman and Carlisle County cases resulted in a sentence beyond the statutory maximum.

At first blush, the court's sentence of five years consecutive for each of three counts of Possession of a Forged Instrument appears to meet statutory muster. After all, KRS 532.110(1)(c) provides that when "multiple sentences. . . .are imposed on a defendant for more than one crime," "[t]he aggregate of consecutive indeterminate terms shall not exceed in maximum length the longest extended term which would be authorized by KRS 532.080 for the highest class of crime for which any of the sentences is imposed." For Class D felonies, KRS 532.080(6)(b) provides that "the maximum

[sentence] shall not be less than ten (10) years nor more than twenty (20) years."

However, the sentence in this case must be considered in conjunction with the sentence in Dustin Goldsmith's Carlisle County case because the "package deal" for both cases was the same: plead guilty and accept a one year sentence for the three charges, respectively, with a "hammer clause" that if Goldsmith did not successfully complete his probation, he would serve the maximum, five years, for each sentence. In other words, Goldsmith received a total of thirty years for six Class D felonies. When it imposed such a sentence, the trial court violated the Separation of Powers doctrine embodied in §§27 and 28 of the Kentucky Constitution and abused its discretion.

In *McClanahan v. Commonwealth*, this Court considered the case of a defendant who had pled guilty to one count each of Robbery in the Second Degree and Theft by Unlawful Taking (over $300), and four counts of Burglary in the Third Degree. Pursuant to the plea agreement, which also contained a "hammer clause," he was sentenced to thirty five years. 308 S.W.3d 694, 695 (Ky. 2010). In considering that case, this Court said, "KRS 532.110(1)(c) does not give a trial court leeway to impose a greater sentence. To the contrary, it explicitly states, through its incorporation of KRS 532.080(6)(b), that the sentence 'shall not exceed' twenty years." *Id.*, at 699. As this Court found in *McClanahan*, it should also find that Dustin Goldsmith's sentence "is not 'within the statutorily prescribed range' of punishment. *Id.*, *citing Jones v. Commonwealth*, 995 S.W.2d 363 (Ky. 1999).

In the *McClanahan* case, this Court also reconsidered its pronouncements in *Myers v. Commonwealth*, in which this Court had found that "[b]y holding that 'a defendant may validly waive the maximum aggregate sentence limitation in KRS

532.110(1)(c) that otherwise would operate to his benefit,'" "the *Myers* Court viewed KRS 532.110(1)(c) as simply an enactment creating specific sentencing rights for individual defendants, who may chose to forego them." 42 S.W.3d 594, 597 (Ky. 2001). In *McClanahan*, this Court changed the *Myers* court's analysis of KRS 532.110(1)(c) to one where "the statute [i]s an exercise of the General Assembly's constitutional authority to establish a comprehensive and cohesive system of sentencing laws, including the range of punishments that are to be imposed in the name of the Commonwealth of Kentucky." *McClanahan, supra*, 308 S.W.3d at 700.

The General Assembly's power over "sentencing laws," including "ranges of punishments," is embodied in the "'extraordinarily strong separation of powers doctrine provided by Sections 27 and 28 of the Kentucky Constitution.'" *Id.*, quoting *Hoskins v. Maricle*, 150 S.W.3d 1, 11-12 (Ky. 2004). This Court also cited *Sanders v. Commonwealth*, 301 S.W.3d 497 (Ky. 2010), where this Court reversed Sanders' conviction for being a persistent felon after he was convicted of Possession of Drug Paraphernalia "because KRS 532.080(8) expresses the clear and unequivocal mandate of the General Assembly that a persistent felony offender conviction shall not be based upon a violation of KRS 218A.500." *Id.* The same amount of deference is due for the maximum sentence permitted. Dustin Goldsmith was convicted of six Class D felonies. The maximum sentence in Class D cases is twenty years.

The *Myers* Court apparently believed that the parties to a plea agreement under which the defendant could be sentenced to more than the statutory maximum could disregard the teachings of KRS 532.110(1)(c). But in *McClanahan*, 308 S.W.3d at 701, this Court said,

> we see nothing in the language of the statute to suggest that the General Assembly intended to excuse plea agreements from the mandatory provisions contained in the statute. Whether recommended by an errant jury or by the parties through a plea agreement, a sentence that is outside the limits established by the statutes is still an illegal sentence. We do not see how an illegal sentence set by a jury (as in *Neace*) does any more to 'nullify the sentencing laws' than an illegal sentence imposed by a judge pursuant to a plea agreement. There is no sound rationale by which we should condemn the one as we condone the other.

In its Opinion, the panel mentioned the trial court's discretion at least twice. It said, "[w]hile the legislature made this maximum sentence possible under the criminal code, there must be some **rational discretion used by the court.**" *Goldsmith v. Commonwealth*, 2009 WL 3399662, 6 (October 23, 2009); emphasis added. It also observed that the trial court, "when later denying the motion to reconsider, deemed the sentiment that the sentence was unduly harsh, '100% right.' What is truly confounding is that the trial court seemed not to remember that it was the trial court who constructed this sentence." *Id.*

In *McClanahan, supra*, this Court noted that "it is the trial judge. . . .[who] actually imposes a sentence by signing his or her name to the final judgment. . . .A sentence that lies outside the statutory limits is an illegal sentence, and the imposition of an illegal sentence is inherently an abuse of discretion." 308 S.W.3d at 702.

The trial court abused its discretion and violated the Separation of Powers doctrine when it sentenced Dustin Goldsmith to a term of years which violated the dictates of KRS 532.110(1)(c). Goldsmith's rights under the Eighth and Fourteenth Amendments to the United States Constitution and §§2, 11, 27 and 28 of the Kentucky Constitution were violated.

**Dustin Goldsmith's sentence, enhanced because he cursed, is extraordinarily harsh.**

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court has held that the provisions of the Eighth Amendment are violated when a sentence is imposed that is "grossly disproportionate" to the crime committed. *Solem v. Helm*, 463 U.S. 277, 288 (1983). Although this "narrow proportionality principle" means that successful challenges to non-capital sentences "are exceedingly rare," such grossly disproportionate sentences do exist. *Harmelin v. Michigan*, 501 U.S. 957, 997, 1001 (1991)(Kennedy, J. concurring in part and concurring in the judgment). In *Solem*, the Supreme Court struck down a life sentence without the possibility of parole, which was grossly disproportionate when imposed on a recidivist following his conviction for uttering a worthless check. *Solem*, 463 U.S. at 303.

At the time of his crimes, Dustin Goldsmith was an eighteen year old drug addict with a girlfriend. In an act of profound stupidity on the one hand and on the other, the act of one to whom the next hit has seized his brain, Goldsmith and Moore wrote three checks totaling $150 on the checking account of Moore's deceased grandmother. His actions with regard to criminal charges in Carlisle County were also to procure drugs.

The trial court's idea of justice was to hand Mr. Goldsmith an almost unobtainable result: the carrot of immediate probation, with several sticks attached: drug rehabilitation in a program of the **court's** own choosing, and one that in the words of the government almost certainly set Goldsmith up for failure. And when Goldsmith did fail, whether it was because he was not suited to the type of rehab, or the rehab itself was simply not getting to the root cause of his drug problems, or it was simply because he was

nineteen years old and in love in the way only a nineteen year old can be, the court itself seemed to reconsider, to wonder whether a fifteen year sentence consecutive to another fifteen year sentence was the best course...until Dustin Goldsmith, in another monumentally stupid move, cursed.

Then the court allowed its ire to get the best of its good judgment, of its sense of justice. The court admitted as much at the July 7 hearing. It said defense counsel was "right [that the sentence was harsh], but your defendant's attitude is not the best in the world." VR; 7/5/2007; 11:32:52. Even two weeks later, when counsel asked the court to reconsider, the court said

> **you are 100% right.** . . .But. . . .that young man sat over there. . . convinced me to consecutive. He was gonna say whatever he wanted to say and if he didn't hear what he wanted to hear, he was gonna take it out on everybody.. . . .**You may convince me later to do something for him because I agree with you, thirty years is too harsh. But, it's also too fresh in my memory what he sat right over there and did last time.**

*Id.*, 11:34:52; emphasis added.

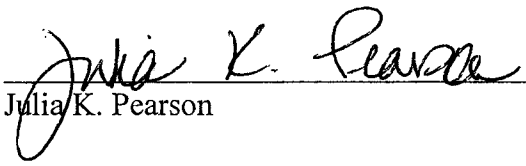
And because of woefully inadequate counsel, because the court allowed its ire to override its sense of justice, Dustin Goldsmith serves a thirty-year sentence for writing checks to support his drug habit. Some people convicted of violating the Sixth Commandment—thou shalt not kill--serve less time than Goldsmith. *See Allen v. Commonwealth*, 286 S.W.3d 221 (Ky. 2009) (convicted of wanton murder; sentenced to twenty years); *Graves v. Commonwealth*, 283 S.W.3d 252 (Ky. App. 2009) (convicted of wanton murder; sentenced to twenty years).

Dustin Goldsmith's rights to fair and rational sentencing under the Eighth and Fourteenth Amendments to the United States Constitution and §§2, 11 and 17 of the Kentucky Constitution were violated. He requests remand for a revocation hearing.

## CONCLUSION

Dustin Goldsmith requests relief.

Respectfully submitted,



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