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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

REPLY BRIEF FOR APPELLANT

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CERTIFICATE REQUIRED BY CR 76.12(b)

The undersigned does hereby certify that copies of this Reply Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this 16th day of May 2011: 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 not removed from the custody of the Clerk of the Kentucky Supreme Court for the purpose of this Reply Brief.

PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's Brief. Any failure to respond should not be taken as waiver of an issue or allegation.

STATEMENT OF POINTS AND AUTHORITIES

This Court properly granted discretionary review

The government argues:

> Goldsmith has acknowledged that the Court of Appeals opinion was critical of Goldsmith's counsel *sua sponte* – he had not raised any prior claim challenging the adequacy of his counsel. Further, in the motion for discretionary review, Goldsmith did not argue *lack of/inadequate counsel* as a claim of error for review.[1]

The government's assertion that Goldsmith must argue the issue as a claim of error on its own is faulty. Rather, Mr. Goldsmith presented lack of/inadequate counsel as a prong in the argument as to why his sentence was unduly harsh in the Motion for Discretionary Review. In the first sentence, he says "[t]he circuit court conducted its sentencing and revocation hearings in a manner that. . . .degraded the reliability of those hearings."[2] In the very next paragraph, he says "the proceedings in this case were more of an inquisition."[3] He expressed the harm from the court's conduct of the inquisition in this manner:

> But even though 'less than three minutes had passed between the time the plea agreement was discussed with the court and the time of acceptance by Goldsmith' and even though '[a]t no time during this brief discussion between attorney and client is there any mention of the potential dire consequences of this course of action'. . . .The panel could not have expressed the harm in any clearer terms.[4]

One page later, as Mr. Goldsmith argued why the court's sentence was unduly harsh, he says "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."[5] Unlike the government's assertion that after this

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[1] Brief for Appellee, hereinafter BA, at 10.
[2] See Motion for Discretionary Review, at 8.
[3] *Id.*
[4] *Id.*, at 9.
[5] *Id.*, at 11.

Court's opinion in *Hunt v. Commonwealth*, 326 S.W.3d 437 (Ky. 2010), "Goldsmith changed tactics and raised this new claim—morphing part of his claim against the trial court into an 'inadequate counsel' claim"[6], the issue has not undergone metamorphosis. Rather, inadequate/lack of counsel has been a part of the prong showing the harm of the court's unduly harsh sentence since the inception of the Motion for Discretionary Review.

The government also takes exception with Mr. Goldsmith even filing a Motion for Discretionary Review, arguing "Goldsmith's motion for a discretionary review was actually an attempt to have this Court act as a trial court or what should have been dealt with in a post-conviction motion," or an "attempt to gain another bite at the apple."[7] CR 76.20 provides that "[a] a motion for discretionary review by the Supreme Court of a decision of the Court of Appeals" is possible. Review "is a matter of judicial discretion and will be granted only when there are special reasons for it." *Id.*

Special reasons exist for this Court's review

The government then argues "[b]ecause this issue was not raised in the Court of Appeals, this claim was procedurally defaulted and should not be reviewed."[8] First, "the Kentucky Constitution undeniably delegates exclusively to this Court the authority to adopt rules of practice and procedure for the Court of Justice and **rules governing our appellate jurisdiction**." *Elk Horn Coal Corporation v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 422-423 (Ky. 2005); emphasis in original, citing §§116, 110(2)(b) of the Kentucky Constitution; *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 576 (Ky. 1995); *Huff v. Commonwealth*, 763 S.W.2d 106, 108 (Ky. 1988); *Smothers v. Lewis*, 672 S.W.2d 62, 64

[6]BA, at 11.
[7]BA, at 8.
[8]BA, at 11.

(Ky. 1984). One of those "rules" is found in CR 76.20(1), which states that discretionary review "is a matter of judicial discretion and will be granted only when there are special reasons for it."

Those "special reasons" include: cases 1) "containing significant or novel issues"; 2) "involving a legal precedent that should be considered"; 3) "involving interpretation of the Kentucky or United States Constitution"; 4) "involving interpretation of statutes or procedural rules"; and/or 5) "involving an issue which is the subject of conflicting Court of Appeals decisions." 5 Bardenwerper, et al., *Kentucky Practice*, Methods of Practice. §37:51 (4th ed. 2010). The issues in this case could fit in the "significant issues", "legal precedent that should be considered" and/or interpretation of statutes" category(ies).

Second, §110(2)(b) of the Kentucky Constitution gives this Court the ability "to exercise appellate jurisdiction as provided by its rules." The judiciary is also the "final unchecked arbiter of constitutional disputes." *Elk Horn Coal*, *supra*, at 422. This Court did not check its common sense at the door. Whether it had concerns about whether the trial court's sentence was unduly harsh, the "hammer clause" the court routinely incorporated into its probation and plea bargain acceptance decisions, a criminal defendant's fundamental right to be heard by himself and by counsel or addressing the inadequate counsel issue, if this Court had desired to deny discretionary review in this case, it would have. Kentucky Constitution, §11; *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004); *Commonwealth v. Terry*, 295 S.W.3d 819 (Ky. 2009).

The Court of Appeals based its concerns regarding lack of/inadequate counsel on the record

Third, this Court has the authority to consider this issue. In *Mitchell v. Hadl*, this Court considered a case brought to it by motion for discretionary review. 816 S.W.2d 183 (Ky. 1991). Hadl had filed suit in the Jefferson Circuit Court alleging that Mitchell had been negligent in a diagnosis and thus, violated the standard of care. *Id.*, 184. About two years into proceedings, Mitchell's motion for summary judgment was granted.

The issue on appeal to the Kentucky Court of Appeals "was whether the 'physical contact' requirement for recovery of damages for negligent infliction of emotional distress had been satisfied by the surgical procedure and biopsy performed." *Id.* A divided panel of the court held that the "physical contact" requirement had been met and reversed the order for summary judgment. Then in both the motion for discretionary review and the brief after review was granted, Mitchell contended "that the physical contact requirement is not satisfied unless such contact is causally related to the claim of emotional distress. . . . In sum, the parties debate the requirements of *Deutsch v. Shein* [597 S.W.2d 141 (Ky. 1980)] and other authorities." *Id.*, at 184, 185.

In the *Mitchell* case, rather than not granting discretionary review, finding it had been improvidently granted or finding the issue defaulted, this Court said "on rare occasions, the facts mandate a departure from the normal practice. When the facts reveal a fundamental basis for decision not presented by the parties, it is our duty to address the issue to avoid a misleading application of the law." *Id.* This Court repeated the notion in even stronger terms in *Priestly v. Priestly*, when it said "[s]o long as an appellate court confines itself to the record, no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties." 99 S.W.2d 594, 596 (Ky. 1997).

In the case at hand, the Court of Appeals confined itself to the record in discussing Goldsmith's inadequate or lack of counsel. The panel began its discussion of the "woefully inadequate time" Goldsmith had to consult with counsel with the words "[t]he record reflects that". *Goldsmith v. Commonwealth*, 2009 WL 3399662, 1, n.1 (October 23, 2009). In a later sentence, the panel said the following: "[]the record reflects that Goldsmith received minimal guidance from his attorney in reference to his initial stipulation to the revocation." *Id.*, at 6. It was thus free to decide "an issue not presented by the parties." *Priestly, supra.* This Court is similarly free to decide the issue as a prong of the unduly harsh nature of the sentence.

State courts have the first opportunity to correct errors

Fourth, the exhaustion and procedural default doctrines are derived from the principle of comity, which are intended to allow a state court the opportunity to correct its own errors. But, as the Supreme Court of the United States ruled, the fair presentation requirement is excused **when the state court addressed the claim on its own**. *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992). Thus, "a state court's decision to raise and answer a constitutional question sua sponte will also permit subsequent federal habeas review" even though the petitioner did not raise the claim in state court. *Walton v. Caspari*, 916 F.2d 1352, 1356-57 (8th Cir. 1990). The Court of Appeals addressed the inadequate/lack of counsel claim on its own. This Court is free to consider the issue as it relates to Mr. Goldsmith's argument that the trial court's sentence was unduly harsh.

Even when a criminal defendant stipulates to violating his probation, the trial court still retains the choice to revoke or modify

The government uses Dustin Goldsmith's stipulations as a talisman that stipulation must always and for all time equal revocation of probation. What the government neglects to

add into its calculus is that even though one may stipulate to a probation violation, the trial court is not forced to automatically revoke that probation. When KRS 533.020(5) states, in pertinent part: "[n]otwithstanding the fact that a sentence to probation. . .can subsequently be modified or revoked," the meaning of that clause necessarily is that the trial court has the ability to revoke or modify probation. Just as every other trial court in the Commonwealth of Kentucky has that power, so, too, did the Carlisle Circuit Court. But the court was simply not satisfied with the stipulation. It followed the procedure identified *infra* as a "hammer clause".

The trial court's policy regarding probation and plea bargains was an analogue to a hammer clause

The government argues "it was obvious that this trial court had a police of only accepting probation (and refusing [to] accept a plea bargain) if a defendant agreed to the maximum penalty for all probated sentences—an arrangement which defense counsel was likely also aware.[9] In a footnote, the government continues,

> as proof this arrangement was court policy, the prosecutor noted the conversion of the sentence to a 15 year arrangement before it was mentioned by the trial court. It was at that time that the trial court explained to Goldsmith that the only way he would entertain probation would be a refusal of the plea bargain and a plea by Goldsmith [to] the maximum on each charge.[10]

The government argues that the prosecutor "adamantly opposed the arrangement calling for probation"[11] and the judge's agreement "noting to Goldsmith that he did not think it was a good deal for him".[12] This argument is belied when this Court examines the

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[9]BA, at 13, citing VR No. 1; 3/1/07; 10:47:20 and VR No. 1; 3/1/07; 10:48:20 and TR 29-32.
[10]*Id.*, at n.5.
[11]*Id.*, at 13.
[12]*Id.*

absolute lack of discretion in the trial court's use of the hammer clause in Hickman County.

As noted *supra*, the government itself said the trial court's policy was to only accept probation and/or to refuse to accept plea bargains only if the defendant agreed to the maximum term. In other words, the trial court's acceptance of plea bargains or acceptance of probation as a sentence necessarily included a provision that if the client violated some term (or terms) of probation or did some wrong to cause the plea to be vacated, the client must agree to serve **the maximum sentence allowed**. Under the terms of *McClanahan v. Commonwealth*, 308 S.W.3d 694, 696 (Ky. 2010), this sort of hammer clause does away with one fundamental element of a trial court's sentencing decisions: that of discretion.

In *McClanahan*, this Court defined a "hammer clause" as a provision of a plea agreement, apparently used in some locales," which "provid[es] that, if a defendant fails to return to court for sentencing (or violates some other agreed-upon condition of release), the Commonwealth withdraws its original sentencing recommendation and the defendant agrees to serve a more severe sentence instead." *Id.*, at 696. In that case, the "hammer clause" acted in this way. The government said it would recommend a term of ten years if McClanahan complied with the conditions of his release. However, if he failed to appear for sentencing, failed to keep the appointment needed to prepare his PSI or was charged with any offense, including a Class A or Class B misdemeanor, he agreed that he would not serve ten years; rather, he would serve forty years and agree not to seek probation or shock probation. *Id.*, at 697.

The trial court failed to use any discretion

That sort of agreement—the sort of agreement made in Dustin Goldsmith's case, did just what the *McClanahan* court found lacking: removed judicial discretion from the calculus. As this Court noted in *McClanahan*, in *Edmonson v. Commonwealth*, this Court reversed a criminal case where, even the sentencing hearing, "'the trial judge had either made up her mind as to the sentence which would be imposed, or she had tentatively decided what sentence to impose unless the defendant came forward with some compelling reason for leniency. . . . KRS 532.110(1) grants the trial court discretion to impose concurrent or consecutive sentences. However, such discretion must be exercised only after the defendant has had a fair opportunity to present evidence at a meaningful hearing in favor of having the sentences run concurrently or present other matters in mitigation of punishment.'" *McClanahan, id.*, citing *Edmonson v. Commonwealth*, 725 S.W.2d 595, 596 (Ky. 1987).

In *McClanahan*, this Court noted that while the final judgments did not appear to be "drafted in advance as in *Edmonson*, our review of the record of both the guilty plea hearing and the sentencing hearing leaves no doubt that the sentencing decision had been made prior to the sentencing hearing, and was made before 'due consideration' could have been given to the 'nature and circumstances of the crime and the history, character and condition of the defendant.' *McClanahan, id.*, at 703, citing KRS 533.010(2). The same is true in the case at bar.

The government's protestations that "[t]he Commonwealth adamantly opposed the arrangement calling for probation"[13] and the trial court's "agree[ment], noting to

[13]BA, at 13.

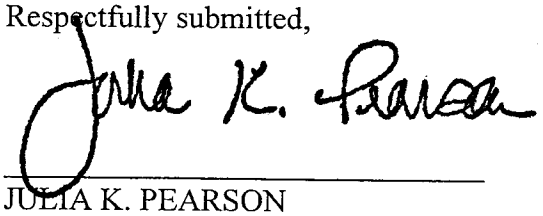
Goldsmith that he did not think it was a good deal for him"[14] are of no moment. The trial court knew that if Dustin Goldsmith came back into his courtroom, his decision as to sentence had already been made and Goldsmith would be sentenced to the five year maximum for each of the three bad check charges. Indeed, in *McClanahan*, this Court said, "[t]he judge reminded Appellant that she had warned him four months earlier (well before the presentence investigation was done), what his sentence would be. That predisposition is inconsistent with *Edmonson* and the statutes." *McClanahan*, *id.*, 704.

The trial court improperly interrogated an uncounseled Dustin Goldsmith and improperly used a hammer clause and failed to exercise discretion in its unduly harsh sentence. Dustin Goldsmith was prejudiced. He requests relief.

CONCLUSION

For the reasons stated in this Reply Brief and the Brief for Appellant, Dustin Goldsmith seeks relief.

Respectfully submitted,



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[14] *Id.*