

2011

Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice

Shon R. Hopwood

Recommended Citation

Shon R. Hopwood, *Slicing Through the Great Legal Gordian Knot: Ways to Assist Pro Se Litigants in Their Quest for Justice*, 80 Fordham L. Rev. 1229 (2011).

Available at: <http://ir.lawnet.fordham.edu/flr/vol80/iss3/10>

This Lecture is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

SLICING THROUGH THE GREAT LEGAL GORDIAN KNOT: WAYS TO ASSIST PRO SE LITIGANTS IN THEIR QUEST FOR JUSTICE

*Shon R. Hopwood**

In Greek mythology, the Gordian Knot was a large intertwined rope that was impossible to untie. The knot was the work of Gordius, a king in what is now Turkey. Legend has it that King Gordius fastened his chariot to a pole using the Gordian Knot. Then Alexander the Great arrived and attempted to unravel it. Anyone who has ever tried to unpack the box of last year's Christmas lights can appreciate what Alexander was up against. He tried, unsuccessfully, and became frustrated at his inability to undo what could not be undone. So he finally opened the Gordian Knot by cutting through it with his sword. Alexander's solution to the problem led to the idiom "cutting the Gordian Knot," which simply means solving a complicated problem through bold action.¹

The problems facing pro se litigants are as daunting as the famed Gordian Knot. Imagine trying to unravel the law without knowing where the ends of the knot begin. Or for that matter, imagine trying to plead your case without the benefit of a legal education. This was the quandary that confronted me.

From 1998 to 2008, I was incarcerated in a federal prison—the result of five bank robberies I committed as a foolish young adult. While in prison, I was fortunate to receive a job in the prison law library. There, I sat reading novels until June of 2000, when the Supreme Court handed down *Apprendi v. New Jersey*,² a case calling into question the U.S. Sentencing Guidelines (Guidelines). Although at the time I could not have named a right in the Bill of Rights, I began the process of learning the law through self-study so that I could challenge my sentence. It ended badly. I filed a post-

* J.D. Candidate, University of Washington School of Law (Gates Scholar), 2014. In 1998, Mr. Hopwood was sentenced to serve twelve years and three months in federal prison for his role in five armed bank robberies. While in prison, he studied law and began preparing briefs for other prisoners. He prepared two petitions for writs of certiorari that were granted by the U.S. Supreme Court, and a host of successful direct appeals, post-conviction motions, and habeas corpus petitions. In 2008, Hopwood was released from prison and became a consultant for Cockle Law Brief Printing Company, where he advised numerous attorneys on Supreme Court practice. He also created The CockleBur (<http://www.thecocklebur.com>), a legal blog. In 2012, Crown/Random House will publish his memoir, entitled *Law Man: My Story of Robbing Banks, Winning Supreme Court Cases, and Finding Redemption*.

1. See generally ARRIAN, THE CAMPAIGNS OF ALEXANDER 104–06 (Aubrey De Sélincourt trans., Penguin Books rev. & enlarged ed. 1971).

2. 530 U.S. 466 (2000).

conviction motion with the Eighth Circuit only to learn that I had filed the motion with the wrong court. Once it was in the hands of the right court, it was unceremoniously denied.

But the result did not discourage me, and I went on to write post-conviction motions and appeals briefs for other prisoners over an eight-year span. While I did have some success, this is definitely not the norm.

I witnessed firsthand the difficulties that pro se litigants face both while I was in prison and later at Cockle Law Brief Printing Company—one of the largest U.S. Supreme Court brief printers in the country and the only printer I am aware of that assists pro se litigants filing petitions for certiorari. Brief printing is kind of a misnomer at Cockle, because that is the easy part. At Cockle, my primary job is to consult with attorneys and pro se parties on everything from filing requirements to how to phrase the Question Presented in a manner to attract the Court's interest. Before the briefs are ready to print, we often consult and sometimes plead with parties to make stylistic and substantive changes to their briefs.

Dealing with pro se litigants is not easy. When a brief comes into Cockle, the office manager sets the documents on a counter where one of the staff will snatch it up to start the process. When a pro se brief is placed on the counter, more often than not, it lingers longer than an attorney-prepared brief. To be sure, someone will eventually take it, but nobody really wants to; they are twice, often four times, more work than a normal brief.

I bet avoiding pro se briefs is a common occurrence among clerks in courts across the country. I recently read a legal blog post discussing a particularly poor circuit brief written by an attorney. In the comment area, someone said that while the brief was awful, it was better than the ones he had read in his three years as a pro se clerk. The next comment was telling on the state of pro se litigation. The comment said: "They should award purple hearts for suffering through that."³

The increase in pro se litigation during these difficult economic times is well documented,⁴ as are the problems facing pro se litigants.⁵ People

3. Cornelian, Comment to *Lousy Legal Writing*, VOLOKH CONSPIRACY (Jan. 7, 2011, 12:01 PM), <http://volokh.com/2011/01/07/lousy-legal-writing/>.

4. See ABA COALITION FOR JUSTICE, REPORT ON THE SURVEY OF JUDGES ON THE IMPACT OF THE ECONOMIC DOWNTURN ON REPRESENTATION IN THE COURTS (PRELIMINARY) 3, 5 (2010), available at http://www.abajournal.com/files/Coalition_for_Justice_Report_on_Survey.pdf (survey of approximately 1,200 state trial judges noted that 60 percent of judges saw an increase in the number of unrepresented parties in 2009); ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.4 (2009), available at <http://www.uscourts.gov/uscourts/statistics/judicialfactsandfigures/2008/alljudicialfactsfigures.pdf>.

5. See generally Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573 (2002); Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299 (2006); Nina Ingwer VanWormer, *Help at Your Fingertips: A Twenty-First Century Response to the Pro Se Phenomenon*, 60 VAND. L. REV. 983 (2007); RICHARD MOORHEAD & MARK SEFTON, DEP'T FOR CONSTITUTIONAL AFFAIRS, LITIGANTS IN PERSON: UNREPRESENTED LITIGANTS IN

filing pro se must try to untie the tangled rope of procedure, rules, and precedent on their own. The result is often a morass of indecipherable legal pleadings, forfeiture of basic rights, and clogging of court dockets. Thomas O'Bryant, a prisoner serving a life sentence in Florida, described the obstacles confronting him as a pro se prisoner:

I had to engage in two *extremely* difficult tasks: I had to teach myself the law, and I had to represent myself. I had to perform these tasks using only the limited resources available to me inside the prison walls and while trying to adjust to prison life, overcome mental health issues, such as severe depression, and fight a drug addiction.⁶

Rather than providing some overarching solution for the myriad problems faced by pro se litigants (because no one-size-fits-all solution exists and I am not that smart), I will discuss three specific difficulties I have witnessed and how these problems could be rectified. The first problem involves federal prisoners filing post-conviction motions; the second involves pro se prisoners filing civil rights actions; and the third involves pro se civil litigants filing an appeal. Although the impediments associated with pro se litigation are overwhelming, they can be reduced through targeted legislation, court action, and the assistance of the bar.

In 1995, Timothy McVeigh committed a heinous act of terrorism. While tragic, the government's response—as is usually the case when it acts in the moment—was to pass legislation that was almost equally as tragic. On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996⁷ (AEDPA). Among other things, the Act established a one-year limitation for federal defendants wishing to collaterally attack their conviction or sentence through a motion under 28 U.S.C. § 2255. That one-year period runs from when the judgment becomes final, which could be as quick as ten days after sentencing, or after the direct appeal is completed.⁸

In signing AEDPA, President Clinton hailed it as a way for the United States to remain “in the forefront of the international effort to fight terrorism through tougher laws and resolute enforcement.”⁹ In describing the changes to prisoners' ability to avail themselves of the writ of habeas corpus, the President stated: “First, I have long sought to streamline Federal appeals for convicted criminals sentenced to the death penalty. For

FIRST INSTANCE PROCEEDINGS 153–80 (2005), *available at* <http://www.law.cf.ac.uk/research/pubs/repository/1221.pdf> (discussing various issues facing pro se litigants in English courts).

6. O'Bryant, *supra* note 5, at 300.

7. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

8. *See* 28 U.S.C. § 2255(f)(1) (2006 & Supp. I 2007); *see also* Clay v. United States, 537 U.S. 522 (2003).

9. Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 631 (Apr. 24, 1996), *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=52713>.

too long, and in too many cases, endless death row appeals have stood in the way of justice being served.”¹⁰

While President Clinton may have thought the goal of the Act was to confront terrorism and reduce the amount of time death row inmates have to challenge their convictions and sentences, the actual statute had a far broader sweep than was needed to accomplish those goals. As I noted, AEDPA bars *all* federal prisoners from filing post-conviction motions challenging their case unless those prisoners file the motion within one year of sentencing or direct appeal.

To the casual observer, that seems like a reasonable procedure. After all, federal defendants do receive an attorney for a direct appeal to an appellate court, so every conviction and sentence has the possibility of review. Thus, why would prisoners need another appeal? Even if they did, it seems reasonable to require them to file it within a reasonable amount of time.

But those arguments assume that appellate review ferrets out every case where a legal error or a miscarriage of justice has occurred.¹¹ Worse yet, such an argument assumes that lawyers are infallible, because only claims raised at the trial court level and subsequently appealed are subject to review. If the trial attorney commits a grave error, and she is the same counsel on appeal, how likely is it that she will find and raise her own error before the appellate court? It is not.

For this reason, we have post-conviction motions that are used primarily to challenge attorney acts or omissions amounting to ineffective assistance of counsel.¹² While I was in prison, post-conviction motions under § 2255 were the principal way that prisoners would challenge everything from attorney sentencing error to counsel’s failure to file a timely notice of appeal.¹³

The writ of habeas corpus, under which § 2255 motions fall, is not some extravagant, ill-advised method for prisoners to receive another bite at the apple. Rather, it is a sacred right secured in the body of the Constitution, a right that the “Framers viewed . . . as a fundamental precept of liberty” and a “vital instrument to secure . . . freedom.”¹⁴ Although the Framers thought that habeas corpus was a necessary component to a free society, subsequent Congresses have not shared that sentiment.¹⁵

10. *Id.*

11. See Brendan Lowe, *Will Georgia Kill an Innocent Man?*, TIME (July 13, 2007), <http://www.time.com/time/nation/article/0,8599,1643384,00.html> (discussing the appellate obstacles that AEDPA created for death row inmate Troy Davis). Georgia executed Troy Davis on September 21, 2011. See Cameron McWhirter, *Georgia Prisoner Is Put to Death*, WALL ST. J. (Sept. 22, 2011), <http://online.wsj.com/article/SB10001424053111903703604576584551697538170.html>.

12. See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

13. For an excellent description of the unfairness wrought by AEDPA on post-conviction remedies, see Bryan A. Stevenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. C.R.-C.L. L. REV. 339 (2006).

14. *Boumediene v. Bush*, 553 U.S. 723, 739 (2008).

15. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635–36 (codified at 28 U.S.C. § 2241 (2006)).

AEDPA's one-year statute of limitations places significant hurdles in front of federal prisoners who are ill-equipped to meet the Act's deadline. These hurdles were on full display in the case of Melvin Brown.¹⁶ Melvin was a gentle twenty-four year old from Chicago, whom I met at the Federal Correctional Institution in Pekin, Illinois. Melvin had been charged with possession with intent to distribute six grams of cocaine base.¹⁷ The evidence against Melvin was overwhelming and based upon his attorney's sound advice, he pled guilty. His sentencing occurred in 2003, before the big *Blakely* and *Booker* cases threw federal sentencing into chaos by making the Guidelines ranges discretionary.¹⁸

Melvin came from poverty, and his criminal record reflected it. He had been charged with petty theft and distributing small amounts of narcotics, including one conviction in Illinois for what the state information said was possession with intent to distribute 0.1 grams of crack. Since Melvin had been convicted of a serious "controlled substance offense" and had two previous controlled substance offenses, he was subject to the Guidelines' career offender provision.¹⁹ That provision boosted his sentence from a Guidelines range of approximately five to seven years to a range of sixteen to eighteen years. He was sentenced to fifteen years and eight months.²⁰

Ten days later, Melvin's conviction became final, because Melvin's attorney believed there were no meritorious grounds for appeal. Three months later, Melvin was still awaiting his final destination to a federal prison. By the time Melvin arrived in Pekin, the AEDPA clock had clicked down to seven months. Melvin, with his ninth grade education, was required to learn the law, find the legal errors in his case, draft a lucid § 2255 motion, and have it prepared in seven months.

This set of circumstances was not an anomaly: every week a bus would arrive at Pekin with new uneducated prisoners. Most had no attorney to prepare a post-conviction motion because whatever funds they and their family did possess had already been poured into trial and appeal. These legal novices were expected to learn the law and learn how to write within a year; otherwise, they would forever forfeit the ability to challenge their conviction or sentence.

Melvin knocked on my cell door about two-and-a-half weeks before his § 2255 motion was due. In his hands was a stack of disheveled papers. He asked if I could take a look at his paperwork to see if he had an avenue to attack his sentence.

I went through Melvin's papers, which included documents from his prior state convictions, the ones used to increase his sentence under the career offender provision. I found the Illinois conviction for which Melvin

16. *See* *Brown v. United States*, No. 2:04-cv-00073 (W.D. Mich. July 12, 2004), PACER No. 8.

17. *See* 21 U.S.C. §§ 841(a)(1), (b)(1)(B) (2006).

18. *See* *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

19. *See* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2010).

20. *See* *Brown*, No. 2:04-cv-00073, at 1.

was originally charged with possession of 0.1 grams of crack with intent to distribute. That charge had led to a plea to the reduced charge of simple possession, meaning it was not a distribution charge.²¹ This was a meaningful distinction under the Guidelines and meant that Melvin did not have the requisite number of prior convictions: the career criminal provision did not apply.²²

We filed the motion and the District Court Judge first ordered the probation officer, who prepared the Presentence Investigation Report, to respond. The officer, to his credit, candidly admitted the mistake. The Government agreed. Melvin was sentenced to a little over five years.

These types of stories are legion in federal prisons. They illustrate that as long as fallible lawyers, probation officers, and judges exist, we need meaningful post-conviction avenues for federal prisons. The current post-conviction statute, as amended by AEDPA, restricts prisoners' abilities to file a coherent motion, and therefore, the statute prevents federal prisoners from having a meaningful opportunity to challenge their convictions and sentences.

So what is the solution to this problem? Given our current financial outlook, I doubt Congress would spring for prisoner legal education. The easiest solution would simply be for Congress to remove the one-year statute of limitations for non-capital federal offenders. Why just non-capital offenses? For one, the political climate surrounding the death penalty is always icy and by keeping the one-year requirement for capital offenses, legislators would both avoid politicizing the amendment to AEDPA and serve the original purpose of the Act. Moreover, while I have qualms about the federal death penalty, the one-year requirement for post-conviction matters does not concern me; under current federal law, a federal capital defendant must be appointed two attorneys to represent her throughout post-conviction proceedings.²³ To put it differently, the statute of limitations provision does not require indigent, uneducated prisoners on death row to learn the law and present their claims *pro se*.

Also, if the one-year statute of limitations were removed, prisoners would not feel compelled to file frivolous motions under time constraints. Many would prefer to wait and file when new decisions are handed down that may affect their case, but the one-year limit forces them to file before they are ready.

The next item I would like to discuss is one of the most vexing problems facing prisoners: a lack of health care. Due to prison overcrowding and

21. *See* U.S.S.G. § 4B1.2(b).

22. *See id.* §§ 4B1.1(a), 4B1.2(c).

23. *See* 18 U.S.C. § 3599(a)(2) (2006) ("In any post conviction proceeding under section 2254 or 2255 of title 28, United States Code, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with subsections (b) through (f).").

budget constraints, prisoners are often denied treatment altogether.²⁴ Even when treatment is provided, it is sometimes delayed by weeks, months, or years. This was a particular problem in the prison where I was housed.

I had a sixty-year-old friend named John Davis. One day John was standing on a plastic chair so he could reach the pen lying on the top of his bunk bed. The chair leg broke and John was sent plummeting to the floor. John fractured his wrist in two places. After waiting several hours at the prison medical facility, John was taken to an orthopedic surgeon who reset the bones and placed John's wrist in a half-cast. John and the prison medical staff were instructed to re-examine and x-ray John's wrist a week later. Conducting a new x-ray within a week was vital, the surgeon said, because if the bones had aligned improperly the surgeon would need to re-align John's wrist before the bone fused together during the healing process.

The next week, John waited for his name to be called for an appointment at the prison medical facility. It never was. John tried to discuss the problem with the prison medical administrator, who told him that he would be placed in segregation if he did not return to his housing unit. The x-ray was never conducted and when John visited the surgeon a month later, the surgeon was furious because his order had been disobeyed. The bones in John's wrist had healed improperly, leaving John with significant lost functionality of his wrist.

John sued the prison medical staff for deliberate indifference to his serious medical needs under the Eighth Amendment. He survived a motion to dismiss and discovery began. When he contacted the outside surgeon, he received no response. Later, when the prison filed a motion for summary judgment, the surgeon—who had a long-running contract with the prison—had changed his story, now claiming that the x-ray would have made no difference.

I had my sister conduct research online, which indicated that the prison's delay in x-raying John's wrist could have contributed to the improper healing and loss of function. But under circuit precedent, that was not enough.²⁵ John was required to show, through verifying medical evidence, that the delay in treatment caused harm. We tried to contact medical experts but no one would respond, so we filed a motion to conduct a deposition with the surgeon who had treated John and a surgeon who did not possess a contract with the prison.

Since John made only twenty cents an hour at his prison job, he was unable to afford the witness, transcription, and subpoena fees required to perform a deposition. We argued that the *in forma pauperis* (IFP) statute

24. Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 641–48 (2010).

25. See *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir. 1996) (holding that an inmate alleging deliberate indifference delay in medical care “must place *verifying medical evidence* in the record to establish the detrimental effect of delay” or risk dismissal of his suit (quoting *Beyerbach v. Sears*, 49 F.3d 1324, 1326 (8th Cir. 1995))).

allowed the court to waive the deposition fees for indigent litigants who have no other way to obtain the verifying medical evidence required to succeed on a deliberate indifference claim. That argument was rejected with little discussion by the District Court and the Seventh Circuit on appeal.²⁶

In my experience, the difficulty indigent prisoners have in obtaining evidence to support their deliberate indifference claims is significant. How can any prisoner expect to succeed in proving, through verifying medical evidence, that the delay in their treatment caused medical harm without access to doctors and medical specialists? If prisoners have no ability to obtain the evidence necessary to prove their claims, it follows that they cannot remedy a violation of their constitutional rights. In effect, the Eighth Amendment prohibition on cruel and unusual punishment is nothing more than dead words on paper—a pleasant ideal that is never enforceable.

What is most unfortunate is that, in 1892, Congress provided indigent litigants with a way to obtain depositions sans fees. In fact, the IFP statute specifically addresses this issue. That statute states that “officers of the court shall issue and serve all process, and perform all duties in such cases” and “[w]itnesses shall attend as in other cases.”²⁷ Unfortunately, this language was read right out of the statute by federal courts of appeals in the 1980s and early 90s,²⁸ due to concerns that the statute would create a waste of resources by frivolous prisoner suits. Those opinions conflict with a later Supreme Court decision,²⁹ confuse the history of the IFP statute,³⁰ and are based upon policy concerns that have largely been ameliorated with the passage of the Prison Litigation Reform Act of 1995.³¹ For these reasons, I have argued that courts should reconsider how they construe the IFP statute.³²

One small note: even if my construction of the IFP statute does prevail, it would not result in a waste of resources for overburdened courts. The Prison Litigation Reform Act allows district courts to dismiss frivolous suits before the discovery stage or at any other time if they feel that the claim is frivolous. In addition, most indigent prisoner suits do not require

26. *Davis v. Samalio*, 286 F. App'x 325 (7th Cir. 2008).

27. 28 U.S.C. § 1915(d) (2006).

28. A consensus of circuits holds that § 1915 does not authorize courts to waive indigent litigants' witness fees in civil actions. *See Pedraza v. Jones*, 71 F.3d 194, 196–97 (5th Cir. 1995); *Malik v. Lavalley*, 994 F.2d 90, 90 (2d Cir. 1993); *Tedder v. Odel*, 890 F.2d 210, 211–12 (9th Cir. 1989); *Boring v. Kozakiewicz*, 833 F.2d 468, 474 (3d Cir. 1987); *McNeil v. Lowney*, 831 F.2d 1368, 1373 (7th Cir. 1987); *Cookish v. Cunningham*, 787 F.2d 1, 5 (1st Cir. 1986); *U.S. Marshals Serv. v. Means*, 741 F.2d 1053, 1057 (8th Cir. 1984) (en banc); *Johnson v. Hubbard*, 698 F.2d 286, 289–90 (6th Cir. 1983).

29. *See Mallard v. U.S. Dist. Court*, 490 U.S. 296, 307–08 (1989) (holding that courts may request pro bono counsel to represent indigent litigants).

30. *See* 28 U.S.C. § 1915.

31. Pub. L. 104-134, 110 Stat. 1321 (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.).

32. *See generally* Shon R. Hopwood, *A Sunny Deposition: How the In Forma Pauperis Statute Provides an Avenue for Indigent Prisoners to Seek Depositions Without Accompanying Fees*, 46 HARV. C.R.-C.L. L. REV. 195 (2011).

outside medical evidence in order to succeed. The only result of the construction I propose is that indigent litigants with arguably meritorious claims would have the ability to conduct a deposition without fees in cases where there is no other means for obtaining the relevant evidence. While this issue will undoubtedly be litigated by pro se prisoners at the trial level, that is not enough. Members of the bar are needed to confront the courts of appeals in order for the issue to be taken seriously.

The last item I will discuss is my experience working with pro se civil litigants on appeal. The past few years have seen a huge increase in the amount of people filing civil appeals pro se. In 2004, for example, non-prisoner pro se litigants filed over 4,500 civil appeals in federal circuit courts, accounting for 14 percent of the civil appeal docket.³³

The obstacles that pro se litigants face on appeal are similar to those found at the trial court level. But on appeal, courts generally seem to enforce more stringent rules for pleadings and exhibit far less leniency than their trial court brethren. This sometimes produces multiple deficiency letters and exasperation both from the party and the pro se clerk.

I routinely work with these litigants at Cockle Printing. Many of them contact us after they have received a deficiency letter from the Supreme Court Clerk's Office. Just talking with them takes the right amount of patience, tact, and at times, a delicate dose of forcefulness. The majority of pro se people I encounter have sued big business or the government for discrimination and, right or wrong, they feel that injustices have been committed against them. They also understand, especially after I kindly tell them, that their chances in the Supreme Court are next to nil. It is usually then that they say, "I know, Shon, but I have got to take my chance anyway." To them, the Supreme Court is not only the place where the little guy gets his chance. It is also, in the eyes of a pro se litigant, a place of closure.

Solutions start with the courts. While many appellate courts—including the Supreme Court—have added pro se resources for filing requirements to their websites,³⁴ few have added substantive tools necessary for pro se litigants to succeed when presenting their claims.

Online tools can play a profound role in assisting pro se litigants. Cockle has a whole page dedicated to the services it can provide to pro se

33. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS tbl.S-4 (2004), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/tables/s4.pdf> (citing statistics for the twelve-month period ending September 30, 2004); see also ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES tbl.2.4 (2006), available at <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2006/Table204.pdf> (noting that, in 2004, all pro se appellants filed over 25,000 appeals, accounting for 42.7 percent of the federal circuit court docket).

34. See *Guide for Prospective Indigent Petitioners for Writs of Certiorari*, U.S. SUPREME COURT (2010), <http://www.supremecourt.gov/casehand/guideforifpcases2010.pdf>; *Memorandum to Those Intending to Prepare a Petition for a Writ of Certiorari in Booklet Format and Pay the \$300 Docket Fee*, U.S. SUPREME COURT (2010), <http://www.supremecourt.gov/casehand/guidetofilingpaidcases2010.pdf>.

litigants,³⁵ and more importantly, provides two different sample petitions that they can use as guides.³⁶ Courts too would be wise to place sample motions and briefs on their website. (One word of caution for courts thinking about adding sample briefs to their websites: make sure the briefs you display meet all of the court's filing requirements. Pro se filers will follow those sample briefs sometimes to the letter and if the brief contains mistakes so will their filings.)

Another way to assist pro se litigants in improving the quality of their briefs is through online education. I believe that a series of online tutorials could save court clerks a vast amount of time, and therefore increase the efficiency of the courts. In deciding what type of information should be provided in the tutorials, nothing should be taken for granted. The very first tutorial should offer a summary of the appellate court's role and explain what types of claims are reviewable. For courts with discretionary review, a video explaining the chances of success would be the best advice any court could give to a would-be filer. Most pro se petitioners at the Supreme Court level simply do not understand the odds against them and an explanation from the Court of the success rate and types of claims that are reviewed would deter some of these financially-strapped people—who have little chance at review—from filing in the first place. Appellate courts should also place forms and fact sheets on their websites, like forms for simple motions such as extensions of time and fact sheets answering common questions on filing requirements and the appellate process.

The bar can also help pro se parties on appeal by providing “unbundled” services, which, in the case of appellate work, amounts to ghostwriting briefs. While ghostwriting was once looked upon with disdain, in recent times it has recently been viewed as an opportunity for the bar to provide cost-effective legal guidance to those who cannot afford full representation.³⁷ Indeed, even the American Bar Association has given its imprimatur to ghostwriting by recently loosening the ethical rules surrounding it.³⁸

Through my company, I have worked with attorneys that regularly provide ghostwriting services to pro se parties on appeal. In every one of the cases, the client could not afford the cost of full representation and it was for that reason that they had contacted the attorney about unbundled services. All of the clients seemed to appreciate the low-cost services we

35. *Pro Se Briefs*, COCKLE LAW BRIEF PRINTING CO., <http://www.cocklelaw.com/briefs/pro-se-briefs/> (last visited Nov. 16, 2011).

36. *Resources*, COCKLE LAW BRIEF PRINTING CO., <http://www.cocklelaw.com/resources/> (last visited Nov. 16, 2011).

37. See Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1926 (1999) (praising law school clinics that provide unbundled legal services and education to pro se litigants); Ira P. Robbins, *Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts*, 23 GEO. J. LEGAL ETHICS 271 (2010).

38. See ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 07-446, at 1, 3-4 (2007).

provided and in return for a reduced fee, they received an attorney-prepared brief that they filed pro se—placing them in a much better position to succeed on their claims.

From my experience, I can tell you that there is no rule of law, ethical guideline, or policy preference that can place pro se litigants on equal footing with those represented by counsel. Yet there are ways for us to reduce the inherent inequities in our adversarial system for those unable to afford the cost. Success for the pro se litigant is not unreachable. They simply need some help. It is up to every part of the legal system to provide that help so that justice may be acquirable for all.