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DANIEL HILL POLLITT†

I first knew there was a Gene Gressman toward the end of my law school career when I applied for a job with the Washington, D.C. firm of Van Arkel and Kaiser, a small liberal Democratic firm mostly representing labor unions. I was told there were no openings, as EUGENE GRESSMAN recently had agreed to join the firm. The two partners were nice about it all, but the tone of voice when they said EUGENE GRESSMAN conveyed the message that I somehow was presumptuous in putting forth my credentials when Gressman wanted the job.

I made inquiries, and was told by one and all that Gene Gressman was the brightest of all the bright Supreme Court clerks, finishing an unprecedented five year stint with Justice Frank Murphy; and an exceptionally pleasant fellow to boot.

In due course I became associated with the firm of Rauh and Levy. Like Gene's firm it was headed by brilliant former "new Dealers" interested in the cause of civil liberties, civil rights, electing liberal democrats, and advancing labor unions. It was inevitable that our professional paths would cross and criss-cross; and they did. Indeed, on one occasion Gressman wrote the Supreme Court brief in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 283 v. Scofield*,[1] arguing that a union charged by its members with violation of the Labor Act and vindicated by the Labor Board (the "charged party") had a right to intervene in the subsequent appellate proceedings filed by the members. I wrote the brief in the consolidated case of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, Local 133 v. Fafnir Bearings*,[2] arguing that when the same union charged a company with violation of the Labor Act (the "charging party") it had the self same right to intervene when the company appealed to the court from an adverse order of the Labor Board.

The many professional contacts we had resulted in lunch on almost a weekly basis; and this in turn to lasting friendships between members of our families. He was (and is) stimulating company at all levels. But the true worth of a lawyer is told by the cases he takes; and Gressman is first and foremost a lawyer. Rather than eulogize the man, I will let his cases speak for him: two petty robbery cases, two capital murder cases.

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1. 382 U.S. 205 (1965).
2. 382 U.S. 205 (1965).

THE CASE OF GEORGE H. CASH

George H. Cash was riding a crowded District of Columbia bus one rush hour with a friend. They followed an elderly man off the bus, who was jostled, felt for his wallet, and promptly accused Cash of picking his pocket. A policeman testified in the subsequent trial that Cash had confessed to the theft, and took him (the policeman) to an alley where Cash said he had thrown the wallet. They found the drivers' license of the victim, and other personal matters, but not the wallet. Cash was convicted of robbery and sentenced to jail. Cash was without money, filed a *pro se* appeal, and petitioned the trial judge to permit the appeal in forma pauperis without prepayment of costs. The trial judge refused this request on the theory that the appeal was "not taken in good faith."

Gressman then was appointed by the United States Court of Appeals for the District of Columbia Circuit to represent Mr. Cash. The case was not a strong one, but Gressman argued that the appeal in forma pauperis should be granted because there was one issue of substance, namely that the trial court had erred in admitting into evidence the oral confession to the policeman when there had not been, as required by other decisions, independent corroboration which both justified an inference that the confession was true, and tended to establish the *corpus delicti.*

The pertinent statute provides that "an appeal may not be taken *in forma pauperis* if the trial court certifies in writing that it is not taken in good faith."[3] The court of appeals interpreted the statute to mean that an appeal is not taken "in good faith," regardless of a subjective state of mind, if the appeal is " 'manifestly insufficient and futile,' " that is, "without any realistic chance of success on the merits." Applying this standard, the court dismissed Gressman's petition to proceed in forma pauperis.[4] Chief Judge Edgerton dissented. The proper test, as he saw it, is whether the appeal is "frivolous," not whether the question is "substantial"; and that "[a]n appeal may raise a substantial question and yet be unlikely to succeed."[5] On a deeper level, Edgerton noted that some people urge that the courts should not be burdened with appeals that are unlikely to succeed. To this he answered, "The United States can afford to let poor defendants take criminal appeals that the rich could take. It cannot afford to do otherwise."[6]

Gressman petitioned the court of appeals for a rehearing en banc on the grounds that the panel had misconstrued the applicable standard in the forma pauperis statute; that the appropriate standard would permit an appeal if the petition sets forth "nonfrivolous claims" without regard to the ultimate merit of those claims. The petition for rehearing was denied. Gressman's assignment was over, but he was not through. (At that time court appointed counsel received no remuneration).

3. 28 U.S.C. § 1915(a) (1982).
4. Cash v. United States, 261 F.2d 731, 737-38 (D.C. Cir. 1958).
5. *Id.* at 740-41 (Edgerton, J., dissenting).
6. *Id.* at 741 (Edgerton, J., dissenting).

He filed a petition for certiorari with the Supreme Court, asking it to review the case and adopt his suggested "nonfrivolous" standard. While the petition was pending, the Supreme Court decided *Ellis v. United States*,[7] wherein it adopted the Gressman position that the "applicant's good faith is established by the presentation of any issue that is not plainly frivolous," and the "good faith test" must not be converted into a requirement "of a preliminary showing of any particular degree of merit."[8] The petition in *Cash* was granted, and the case remanded to the court of appeals.[9]

On remand, the court of appeals reached the merits and held that "there was ample corroboration" of Cash's confession to the detective that he was the pickpocket on the bus.[10]

Gressman lost the case, but established a new and higher standard of law that extended the right of indigent defendants to appeal their convictions to a higher tribunal. Unbeknownst to him, his next client would be a beneficiary of this ruling.

THE CASE OF BENNY LURK

Benny Lurk and a friend went into a "carry out," and at knife point robbed a patron of $58.30. Unfortunately for them, the victim recognized Lurk from former times as a fellow inmate in Occoquon prison. Lurk was arrested, tried, convicted of robbery, and sentenced to a prison term of not less than four nor more than fourteen years. His court-appointed trial attorney withdrew from the case, and like Cash before him, Lurk filed a *pro se* motion for leave to appeal in forma pauperis. The trial judge denied the motion as "plainly frivolous," and "not made in good faith." Lurk then filed a *pro se* petition in the United States Court of Appeals for the District of Columbia Circuit for leave to appeal in forma pauperis, without prepayment of costs. The court of appeals once again appointed Gene Gressman to file a memorandum in support of Lurk's petition.

Gressman applied a variant of the old adage that when the facts are against you, you argue the law; and when the law is against you, you argue the facts; and when both the law and facts are against you, you argue that the judge was biased. But, here Gressman had a good point.

The judge who presided at Lurk's trial was Joseph R. Jackson, a retired judge of the Court of Customs and Patent Appeals. Earlier on, the Supreme Court had ruled that this was a "legislative" court created by Congress under its article I power to regulate commerce.[11] The court in which Lurk was tried was created by Congress pursuant to its article III authority to vest judicial power in "such inferior courts" as Congress "may from time to time ordain and establish." The judges of article III courts hold office "during good Behaviour," and receive a salary "which shall not be diminished during their Continuance in

7. 356 U.S. 674 (1958).
8. *Id.* at 675-76.
9. *See* Cash v. United States, 357 U.S. 219 (1958).
10. *See* United States v. Cash, 265 F.2d 346 (D.C. Cir. 1959).
11. *See Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

Office." The same is not required by the Constitution for judges appointed to the courts created by Congress under article I.

Gressman argued that Benny Lurk had been denied the article III judge he was entitled to when tried before an article III court. The Government moved to dismiss the appeal as "frivolous," and the court of appeals did so without opinion. Gressman's appointment terminated, and this would have been the end of it for most lawyers. Gressman, however, carried the case to the Supreme Court on the theory that the court of appeals once again had applied an erroneous interpretation of the in forma pauperis statute. Gressman won, the Court holding in a brief per curiam opinion that "[t]he judgment of the Court of Appeals is reversed and the case is remanded to that court."[12]

On remand, after full briefing and oral argument, the court of appeals ruled for the Government. It reasoned that whatever the situation might be elsewhere, since article I, section 8, clause 17 gives Congress "exclusive legislation in all cases whatsoever" over the District of Columbia, Congress could appoint judges from article I "legislative" courts to sit on article III courts in the District of Columbia.[13]

This did not sit well with Gressman. He felt that the congressional exercise of power over the District of Columbia must be consistent with the safeguards of article III (and all other provisions of the Constitution); and that there was a denial of equal protection when citizens of the District, but not citizens elsewhere, could be tried in article III courts by judges without constitutional tenure.

He took these concerns to the Supreme Court in a petition for certiorari, and for a second time the Court agreed to hear the case.[14] It was consolidated with *Glidden Co. v. Zdanok*,[15] in which a similar issue was raised when a judge of the Court of Claims was assigned to sit on a case in the United States Court of Appeals for the Second Circuit. The issues were identical, as earlier the Supreme Court had ruled that the Court of Claims was a "legislative" court.[16] But the Supreme Court found it unnecessary to reach the issues raised below and argued extensively by the parties and a number of amicus briefs. Instead, it overruled its prior decisions in *Ex parte Bakelite Corp.* and *Williams v. United States*. Because both the Court of Customs and Patent Appeals and the Court of Claims now were held to be "constitutional courts" created under article III of the Constitution, their judges could be assigned to sit on other courts created by the judiciary article of the Constitution.[17]

So ended the saga of Benny Lurk. The right of indigent defendants to appeal their convictions in forma pauperis was reaffirmed for a second time; the

12. *See* Lurk v. United States, 366 U.S. 712, 712 (1961).
13. Lurk v. United States, 296 F.2d 360 (D.C. Cir. 1961).
14. Lurk v. United States, 368 U.S. 815 (1961).
15. 370 U.S. 530 (1962).
16. *See* Williams v. United States, 289 U.S. 553 (1933).
17. *Glidden*, 370 U.S. 530 (1962).

arcane law of federal courts' jurisdiction was canvassed and developed in an opinion sweeping over seventy-five pages of the United States Reports.

THE CASE OF AUBRY WILLIAMS

The case of Aubry Williams, literally, was a case of life or death.

On October 21, 1952, Williams, a black man, was indicted for the murder of a white man in Fulton County, Georgia. He was convicted by an all-white jury, and sentenced to death in the electric chair. He appealed, and on October 14, 1953, the Supreme Court of Georgia affirmed the conviction. Williams' attorney had not challenged the process of selecting a jury at any stage of the proceedings.

Meanwhile, in the contemporaneous case of *Avery v. Georgia* the black defendant in a capital case did attack the jury selection system in Fulton County where it was the practice of fifty years or more to put the names of prospective white jurors on white slips of paper, the names of prospective black jurors on yellow slips of paper, to shake well, and have a judge draw the slips with eyes wide open. The result: white jurors outnumbered black jurors in a selection process that pointed solely to racial considerations. In the *Williams* case the judge pulled out 120 slips, 116 representing whites, 4 representing blacks.

On April 14, 1952, the Georgia Supreme Court condemned the system in general, but sustained the conviction of defendant Avery because he had failed to prove that the individual judge who had drawn the slips in his case had practiced racial discrimination.[18] On May 25, 1953, the United States Supreme Court reversed this decision, and invalidated the system as a whole. The opportunity presented for discrimination, felt the Supreme Court, was just too great to be overlooked.[19]

On December 1, 1953, long after the *Avery* decision came down, Williams filed a motion for a new trial. For the first time he objected to the system of selecting jurors. The trial court dismissed the motion, and the Supreme Court of Georgia affirmed. The supreme court admitted that the system "had been condemned by this court and the Supreme Court of the United States," but held that the motion was out of time. It came too late, because Georgia law requires that any challenge to the jury be raised at the time the jury is selected, and before the trial begins.[20] It looked like Williams would be executed because his court-appointed attorney had blundered.

But the court-appointed attorney stayed on and petitioned the Supreme Court to review the case. The Court issued a writ of certiorari,[21] and as time for oral argument drew nigh the Clerk notified both sides that the case would be argued on March 3rd. Williams' attorney replied that he could not make it, and explained that he had not been paid anything yet, that a trip to Washington

18. Avery v. State, 209 Ga. 116, 70 S.E.2d 716 (1952), *rev'd*, 345 U.S. 559 (1953)..
19. Avery v. Georgia, 345 U.S. 559 (1953).
20. *See* Williams v. State, 210 Ga. 665, 82 S.E.2d 217 (1954).
21. *See* Williams v. Georgia, 348 U.S. 854 (1954).

would be out-of-pocket to him, and that in any event he was scheduled to argue a motion for temporary alimony in a divorce case in Georgia that week.[22]

The Supreme Court then appointed Eugene Gressman to fill the void and file an amicus brief in the case on behalf of Williams.[23] Gressman filed a brief, argued the case, and won, at least for the nonce.[24]

The Supreme Court noted that the Georgia rule on dismissing late motions was not ironclad, that occasionally the rule was waived in the interest of justice. The Court further noted that this was a "death" case, and therefore rejected "the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled."[25] The Supreme Court remanded the case to the Georgia Supreme Court for further consideration.

Gressman's Supreme Court victory was not long lasting. On remand the Georgia Chief Justice Duckworth began that court's decision by quoting the tenth amendment, and then refused to acknowledge the Supreme Court's authority "on strictly State questions," such as waiving the rule on late motions. The earlier judgment affirming the death sentence was adhered to.[26] This decision, commented Prettyman, "not only told the Supreme Court to mind its own business, but virtually told it to go to hell."[27]

But the story had not yet ended. Local counsel came back in the case, and with Gressman filed a petition for certiorari a second time. They argued that the "flat defiance of this Court's ruling raises a most basic question as to the supremacy of this Court over state courts on issues arising out of the federal Constitution." Apparently the Supreme Court did not see it that way, for on January 16, 1956, the Supreme Court denied certiorari.[28]

Gressman wrote a petition for rehearing. This too was denied.[29] But then Governor Griffin of Georgia granted a thirty day reprieve so Gressman could explore other avenues for redress. Gressman urged local counsel to file a petition for habeas corpus in the federal district court in Georgia, and enlisted noted Georgia civil rights attorney Morris Abram in the case. Local counsel agreed to file a petition, and made arrangements with the federal judge for the Southern District of Georgia. But then he had second thoughts. As local counsel put it in a letter to the American Civil Liberties Union in New York, "any further efforts in behalf of Williams would be of no benefit to him, and almost surely be detrimental to me."[30]

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22. For a detailed discussion of this story, see B. PRETTYMAN, DEATH AND THE SUPREME COURT 258-94 (1961).

23. *See* Williams v. Georgia, 348 U.S. 957 (1955).

24. Williams v. Georgia, 349 U.S. 375 (1955).

25. *Id.* at 391.

26. Williams v. Georgia, 211 Ga. 763, 88 S.E.2d 376 (1955).

27. B. PRETTYMAN, *supra* note 22, at 290.

28. Williams v. Georgia, 350 U.S. 950 (1956).

29. Williams v. Georgia, 350 U.S. 977 (1956).

30. B. PRETTYMAN, *supra* note 22, at 293 (quoting March 28, 1956 letter from Carter Goode to the American Civil Liberties Union).

Gressman received a copy of this letter on March 30, the same day Williams was marched to the electric chair and put to death.

THE CASE OF JEANNACE JUNE FREEMAN

This was another case of life or death, and is typical of many sordid stories coming from death row.

Jeannace Freeman was nineteen years old when convicted of murder. Her earliest years were turbulent. At the age of four she was raped by her drunken stepfather, and this harassment continued. When she was in the eighth grade the stepfather was jailed for contributing to the delinquency of a minor; Jeannace was sent to a state institution for delinquent girls. There she began a series of homosexual relations with other inmates.

She was discharged at age seventeen, and earned a living baby sitting for various relatives. She then met and was employed by one Gertrude Jackson to babysit for the young Jackson children in Oakland, California. Jeannace and her employer began a lesbian love affair, which was impeded by the presence of the two children. Accordingly, they drove to Oregon to place the children in a foster home but on the way fell into an argument. The result was that one or both of them killed the children with a lug wrench, and threw the bodies into a deep gorge. Jeannace was convicted of murder, and the conviction was affirmed by the Oregon Supreme Court.

A friend in the Oregon Civil Liberties Union asked Gene Gressman to seek review in the Supreme Court. Needless to say, many lawyers would not take such a case, especially when there was no fee involved. Gressman however saw constitutional implications in the case, and petitioned the Supreme Court to issue a writ of certiorari. His forma pauperis petition noted that a nineteen year old girl of limited education was held in police custody for a sustained period of time, and that she was subjected to numerous periods of interrogation by experienced and skilled police personnel. She had requested counsel to safeguard her interest, but no appointment was made until the police obtained incriminating statements, which were used against her at trial. Gressman argued that this constituted a denial of the fundamental rights guaranteed to all persons by the Due Process Clause of the fourteenth amendment. The Supreme Court denied review.

Unfortunately for Miss Freeman, this was in March 1963. Gressman was years ahead of his time. The due process he sought was not forthcoming for a decade or more; but his gallant efforts certainly paved the way.

At ceremonial occasions we at the Bar like to claim that law is a learned profession, not a business or trade. We support this proud boast by pointing to the likes of Gene Gressman: scholarly, innovative, tenacious, going the last mile on behalf of all clients—pushing the contours of the law in a more humane direction. Unfortunately, the Gene Gressmans of the profession are all too few. We at Carolina are blessed to have enjoyed his company these past ten years.