

23-6863 NO. **ORIGINAL**

In the
Supreme Court of the United States

Rena Bilbro,

Petitioner,

v.

Education Professional Standards Board,

Respondent.

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

**PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY**

Rena Bilbro
Petitioner *Pro Se*
216 Tyler Lane
Beaver Dam, KY 42320
(270) 320-2083
bilbro53@gmail.com

QUESTIONS PRESENTED

1. Whether a tenured teacher is entitled to appointed counsel, if she cannot afford counsel, to challenge the revocation of her teaching license.
2. Whether, as a matter of due process, a teaching license may be revoked based upon an issue that has nothing to do with her conduct as a teacher, namely an unsubstantiated claim by her now-adult daughter that the teacher's husband had engaged in sexual abuse years earlier and the teacher failed to take sufficient steps to stop it.
3. Whether the Petitioner was denied due process by the failure to consider the promises made in connection with the plea agreement that her teaching license would not be impacted.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Commonwealth of Kentucky v. Rena L. Bilbro Ohio Circuit Court, NO.
18-CR-00322

Kentucky Ohio District Court Domestic Violence Order 19-D-00152-001

Commonwealth of Kentucky
Education Professional Standards Board
Agency Case NO. 19-92157
Administrative Action No. 20-EPSB-0027

Commonwealth of Kentucky
Franklin Circuit Court
Division II
Civil Action NO. 21-CI-00254

Commonwealth of Kentucky
Court of Appeals
Case NO. 2022-CA-0309-MR

Supreme Court of Kentucky
Case NO. 2023-SC-0259

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Kentucky Court of Appeals has not been officially reported. It is unofficially reported as *Bilbro v. Educ. Prof'l Stds. Bd.*, 2023 Ky. App. Unpub. LEXIS 299, 2023 WL 3398169 (Court of Appeals of Kentucky, NO. 2022-CA-0309-MR, May 12, 2023) and is reproduced in the Appendix at A-2. Kentucky Supreme Court denied review in an unreported order. It may be found at *Bilbro v. Educ. Pro. Stds. Bd.*, 2023 Ky. LEXIS 366 (Ky., Dec. 6, 2023), and in the Appendix at A-1.

JURISDICTION

The Kentucky Supreme Court denied review on December 6, 2023. This petition is being filed within 90 days of the denial. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., Amdt 14:

No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner possessed a teaching certificate issued by Respondent, the Education Professional Standards Board (“EPSB”), which is the state board in charge of establishing performance criteria for both preparation programs and educators themselves. The EPSB is also in charge of protecting Kentucky's public school children from unprofessional behavior on the part of certified teachers. (KRS 161.028(1)(a)). The EPSB has the authority to revoke an educator's certification for any of the reasons listed in KRS §161.120(1).

On or about December 28, 2018, Gerald Burrough, Superintendent of McLean County Schools, informed the Board that Petitioner had been arrested and charged with multiple counts of 1st Degree Complicity to Sexual Abuse, 2nd Degree Complicity to Use of a Minor Under 16 in a Sexual Performance, and Facilitation of an Unlawful Transaction with a Minor. The charges related to alleged circumstances occurring 20 years prior to petitioner's licensing as a teacher concerning her daughter.

Subsequently, the EPSB issued Petitioner notice of the charges via

certified mail and notified her of her right to make a written response to the EPSB within thirty (30) days, in accordance with KRS 161.120. The petitioner issued a response, stating that she “completely and unequivocally den[ies] the allegations made against her in Ohio Circuit Court.”

Petitioner presented a second reply to case number 18-CR-322, stating that she expected to be entirely exonerated. Two weeks later, she explained that she was offered a plea agreement that she “did not accept...because [she] is not guilty.” Subsequently, Petitioner pleaded guilty to one misdemeanor charge, Facilitation of Unlawful Transaction with a Minor, 2nd Degree, and the remaining charges were withdrawn. The misdemeanor charge had nothing to do with original Indictment charges of sexual abuse.

The petitioner and her husband, Billy Bilbro, were told in the plea deal that if she pled guilty to one misdemeanor charge that her teaching certification would not be affected. They were given false promises in the plea deal. The Recommended Order dated December 3, 2020 thus erroneously states “Ms. Bilbro pled guilty to a misdemeanor criminal sex charge under KRS.530.065, for which the board seeks permanent revocation of her teaching certification.”

The EPSB investigated the charges against the Petitioner. The EPSB determined that if the allegations were proven, sanctions would be

warranted. It notified Petitioner by letter on April 9, 2019, that the Board had voted to refer her case for attorney review and investigation. The letter also informed Petitioner that the case would be assigned to one of the EPSB's attorneys to analyze and evaluate the facts, determine whether more evidence was required, and produce a recommendation for the Board.

During its investigation, the EPSB learned that Petitioner had been repeatedly informed that her husband, Billy Bilbro, was molesting their daughter, now married Mrs. Starla Coons, when she was in fifth and sixth grade, years ago. Mrs. Coons, who is now an adult, claimed that Petitioner was aware of the sexual abuse. On one occasion, Petitioner admonished her husband about the sexual assault, but he persisted.

The EPSB investigation was based on hearsay by Mrs. Coons with no physical evidence.

The Ohio District Court issued a Domestic Violence Order against Petitioner, finding that Petitioner posted a threatening Facebook message regarding her daughter, a married adult, putting her in reasonable fear for her safety. The Court ordered that Petitioner not commit any more acts or threats of violence, destroy property, or obtain or attempt to procure guns.

On February 12, 2020, the EPSB filed the Notice of Administrative Hearing, Charge and Issue Statement. Containing six charges:

Count 1: [Petitioner] failed to exemplify behaviors which maintain the dignity and integrity of the profession in violation of 16 KAR 1:020 Section 1(2)(c)1 when she entered a guilty plea to Facilitation of Unlawful Transaction with a Minor, Second Degree. This is also a violation of KRS2 161.120(1)(m).

Count 2: [Petitioner] failed to exemplify behaviors which maintain the dignity and integrity of the profession in violation of 16 KAR 1:020 Section 1(3)(c)1 when she continued to allow her daughter to be subjected to sexual abuse. This is also a violation of KRS 161.120(1)(m).

Count 3: [Petitioner] violated KRS 161.120(1)(a)(2) when she entered a guilty plea to KRS 530.065, Facilitation to Unlawful Transaction with a Minor, Second Degree.

Count 4: [Petitioner] violated KRS 161.120(1)(d) when she demonstrated a willful or careless disregard for the health, welfare, or safety of others as evidenced by her guilty plea to KRS 530.065, Facilitation to Unlawful Transaction with a Minor, Second Degree.

Count 5: [Petitioner] violated KRS 161.120(1)(d) when she demonstrated a willful or careless disregard for the health, welfare, or safety of others when she refused to take action to prevent her daughter from being sexually abused.

Count 6: [Petitioner] violated KRS 161.120(1)(d) when she demonstrated a willful or careless disregard for the health, welfare, or safety of others when [she] made a threat against [her daughter] on social media that resulted in a Domestic and Interpersonal Violence Order to ensure [Petitioner] does not engage in further acts or threats of violence.

An administrative hearing was conducted on November 12, The Hearing Officer issued his Recommended Order on December 3, 2020, recommending permanent revocation of Petitioner's teaching certificate. All

parties filed exceptions. The EPSB issued its Final Order on March 1, 2021, and made a few amendments to the Hearing Officer's recommended Findings of Fact, but fully adopted the Hearing Officer's recommended Conclusions of Law. No mention was made of the plea deal protecting her license. The EPSB permanently revoked Petitioner's teaching certificate.

Petitioner timely sought judicial review. The Circuit Court affirmed, holding that the Board's final order was supported by substantial evidence, and Petitioner's procedural due process rights were met. In addition, it held that Petitioner was not entitled to appointed counsel. The Court of Appeals affirmed and the Kentucky Supreme Court declined to hear a discretionary appeal.

ARGUMENT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE WHAT PROCESS IS DUE IN TENURED TEACHER TERMINATION PROCEEDINGS

A. Introduction

It has long been established that tenured employees in a public school system are entitled to basic procedural due process. A teacher's contract, whether continuing or restricted, is a property right that is protected by due process, including proper notice and an opportunity to be heard, under the Fourteenth Amendment of the United States Constitution. Due process is especially critical when the instructor is a tenured employee whose employment is likely to continue. This is the precise approach followed by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). There is a serious question as to whether Kentucky meets these standards. See Garry L. Edmondson and Kenneth E. Rylee, Jr., *Termination of the Tenured Teacher in Kentucky: Does K.R.S. 161.790 Provide Adequate Due Process?*, 23 N. Ky. L. Rev. 263 (1996). This case presents an opportunity to resolve what process is due.

B. Right to Counsel

Petitioner, a tenured teacher, was denied the right to appointed counsel

in a judicial challenge to her termination. Admittedly, there is no constitutional right to counsel in a civil matter, but, respectfully the precedents on this question should be revisited.

In the historic case of *Gideon v. Wainwright*, this Court ruled that impoverished defendants must be represented by counsel in all felony proceedings. *Gideon v. Wainwright*, 372 U.S. 335, 345-46 (1963). Contemporary commentators movement argue for a comparable expansion of the right to counsel in civil matters where serious matters are at issue. See Stan Keillnor et al., *The Inevitable, if Untrumpeted, March Toward “Civil Gideon,”* 64 SYRACUSE L. REV. 469, 472 (2014) (quoting *Jones v. Barnes*, 463 U.S. 745, 759 (1983)) (citing Robert Hornstein, *The Right to Counsel in Civil Cases Revisited: The Proper Influence of Poverty and the Case for Reversing Lassiter v. Department of Social Services*, 59 CATH. U.L. REV. 1057, 1101(2010)); Russell Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel Is Most Needed*, 37 Fordham Urb. L.J. 37, 38 (2010).

This Court’s precedents on the civil right to counsel has not entirely supported this perspective. It first addressed the matter in *In re Gault*, 387 U.S. 1, 42 (1967) , which determined that adolescents in delinquency trials had a constitutional right to legal counsel under the Due Process Clause.²⁸

The decision in the case acknowledged the liberty interest at stake in delinquency proceedings. *In re Gault* decision remains the pinnacle of Supreme Court law on this matter.

Since *In re Gault*, this Court has heard relatively few cases involving claims for a civil right to counsel. See, e.g., *Turner v. Rogers*, 564 U.S. 431 (2011); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 34 (1981); *Vitek v. Jones*, 445 U.S. 480, 497 (1980).

In *Vitek v. Jones*, convicts filed a due process challenge to their forcible transfer to a mental health hospital. Although the Court acknowledged that the inmates (despite being in state custody) have a liberty interest at stake in the involuntary transfers, its decision did not recognize a civil right to counsel in this situation. More precisely, the Court ruled that convicts facing forced transfer to a mental health hospital have a constitutional right to "competent help," which includes a "qualified and independent advisor."

In two later decisions, *Lassiter* and *Turner*, the Court failed to establish a categorical due process right to counsel in civil matters. *Lassiter* involved a constitutional claim for court-appointed counsel for an indigent petitioner in a state-filed case seeking to terminate parental rights. When assessing *Lassiter*'s claim, the Court followed the balancing standard articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The Court ruled that

determining due process requires consideration of three factors: "1) the private interests that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards, and 3) the Government's interest." The *Mathews v. Eldridge* balancing test thus argues that a due process right to counsel should be evaluated on a case-by-case basis in light of these factors.

In *Lassiter*, the Court found that there was no absolute right to counsel in termination of parental rights matters and that appointment of counsel must be evaluated on a case-by-case basis, despite the fact that its three-factor approach favored appointment of counsel. The Court determined that the personal interest at risk is "extremely important," the state's interest is "relatively weak," and the processes are difficult and may "overwhelm an uncounseled parent." In *Lassiter*, the Court also established the assumption that "an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."

In *Turner*, the Court considered whether the Due Process Clause compels states to provide legal assistance to a destitute non-custodial parent at a child support contempt hearing that could result in civil detention. Michael Turner, the petitioner, had served a year in jail for failing to pay

court-ordered child support. In *Turner*, the Court ruled that, while the procedures used in South Carolina did not meet constitutional guarantees, the Due Process Clause does not require appointed counsel in nonsupport civil contempt proceedings where the opponent is an unrepresented private party and the case is not complex. While *Lassiter* proposed a right to counsel when physical liberty is at stake, *Turner* determined that counsel is not mandatory even in these circumstances.

Respectfully, the Court's retreat from the once-promising prospect of extending *Gideon*'s right to counsel to the civil context has been flawed at every step. See Stan Keillor, James H. Cohen, Mercy Changwesha, *The Inevitable, If Untrumpeted, March Toward "Civil Gideon"*, 64 Syracuse L. Rev. 469, 487 (2014). Overruling "seems inevitable as a matter of sound civics, if not of law. But the legal argument would be advanced by recognizing how essential a civil right to counsel is to meaningful, dignified citizen participation in the courts' critical role in American governance." *Id.*

This case presents this Court with such an opportunity.

C. As a Matter of Elementary Due Process Revocation of a Teacher's License or Certificate Only If it Adversely Affects the Teacher-Student Relationship or Ability to Perform Any Professional Function in an Effective Manner

The charges that led to Petitioner's termination were a family situation that occurred more than 20 years before she was licensed as a teacher. There

is no allegation of inappropriate behavior involving a pupil. Indeed, all of the alleged activity took place outside of work and outside of her professional responsibilities.

"In order to dismiss an employee for acts performed at a time and place separate from employment, a school board must demonstrate a rational nexus between the conduct outside the job and the employee's duties on the job." 78 C.J.S., Schools and School Districts, § 283. This stems from basic due process, since this Court has long held that no person can be refused government employment for reasons unrelated to the obligations of that position. *Pickering v. Board of Education*, 391 U.S. 563-572 (1968); *Shelton v. Tucker*, 364 U.S. 479, 487—490 (1960); *Konigsberg v. State Bar*, 353 U.S. 252, 262 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238—239 (1957); *Wieman v. Updegraff*, 344 U.S. 183, 192 (1952); *United Public Workers of America v. Mitchell*, 330 U.S. 75, 101 (1947); "The Government's obligation to accord due process sets at least minimal substantive limits on its prerogative to dismiss its employees." *Norton v. Macy*, 417 F.2d 1161—1164 (D.C. Cir. 1969)

Based on *Morrison v. State Board of Education*, 461 P.2d 375 (Cal. 1969), and other precedents, commentators have concluded that the nexus requirement is one of due process. See John E. Rumel, *Beyond Nexus: A*

Framework for Evaluating K-12 Teacher Off-Duty Conduct and Speech in Adverse Employment and Licensure Proceedings, 83 U.C.L. Rev. 685, 697 n. 74 (2015). (“Significantly influenced by the California Supreme Court’s decision in *Morrison*, a majority of courts has adopted the nexus standard in evaluating actions against a teacher’s certificate by a state educational agency based on allegations of immorality, unprofessional conduct, conduct unbecoming a teacher and the like and adverse employment actions against teachers on the same grounds by school districts.”); Kristin D. Shotwell, *Secretly Falling in Love: America’s Love Affair with Controlling the Hearts and Minds of Public School Teachers*, 39 J.L. & Educ. 37, 54 (2010).

A noteworthy example is *Powell v. Paine*, 655 S.E.2d 204 (W. Va. 2007), which overturned a license revocation for a teacher’s abuse of his son because of a lack of reasonable link. See also *Professional Standards Commission v. Peterson*, 643 S.E.2d 899 (Ga.App. 2007) (no evidence established that the teachers’ alleged failure to properly supervise their teenaged daughter’s party at their home, which allegedly involved underage drinking, harmed their ability to function professionally). The linkage concept should also apply to criminal convictions. “A criminal conviction is not a basis for suspending a teaching license where a finding was not made that the teacher was also guilty of gross unfitness that was incompatible with the teacher’s professional

duties or of a rational nexus between the conviction and the respondent's duty as a teacher." 67B Am. Jur. 2d Schools, §147. In point of fact, that the EPSB did not include documentation of Petitioner's teaching record and teaching performance, which is obviously required in order to establish a nexus.

In short, this Court should decide whether a tenured teacher can be removed without a demonstration of misconduct that is rationally related to the instructor's job requirements and performance.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT IN THE CIRCUITS AS TO WHETHER AN ADMINISTRATIVE AGENCY MUST AT LEAST CONSIDER THE PROMISES MADE IN CONNECTION WITH A PLEA AGREEMENT

Equally important, as noted above, the Petitioner and her husband, Billy Bilbro, were told in the plea deal that if she pled guilty to one misdemeanor charge that her teaching certification would not be affected. Yet it was.

On this point, the decision of the late Chief Judge Charles Breitel in *Matter of Chaipis v. State Liq. Auth.*, 375 N.E.2d 32 (1978) is very much on point. In that case, he held that prosecutor's promise that liquor license would not be revoked was not binding on the State licensing authority, but remanding to that authority for written statement of reasons if it declined to honor the promise.

As he explained:

The rights of the criminal defendant, however, may not be sacrificed to the conflict between two arms of the State (cf. *Santobello v New York*, 404 U.S. 257, 262 . . .). The office of the special prosecutor and the State Liquor Authority are both but agents of the same State of New York, having a common public policy to enforce. Justice does not allow one agent to ignore promises made by the other, whatever the breadth of discretion involved.

Instead, an earlier promise made by a prosecutor, an agent of the State, must be treated as a highly significant factor when the State agency with the power to enforce the promise is called upon to do so. The mere fact that an agent of the State made a representation to a criminal defendant and the defendant then pleaded guilty, assertedly in reliance on the representation, is entitled to weight.

The federal courts are divided on this point. At one extreme, the U.S. Court of Appeals for the Eighth Circuit held in *Margalli-Olvera v. Immigration and Naturalization Service*, 43 F.3d 345 (8th Cir.1994), that United States Attorneys have, implicit in their authority to prosecute on behalf of the United States, actual authority to bind the United States and its agencies, including the Immigration and Naturalization Service, to plea agreements. At the other extreme, the Eleventh Circuit held in *San Pedro v. United States*, 79 F.3d 1065 (11th Cir.1996), that the general power of United States Attorneys to prosecute does not override the specific statutory grants of authority to other governmental offices and agencies, so that a broken prosecutorial promise purporting to usurp the discretion of some other agency might be grounds for rescinding a guilty plea, but it does not give rise to a

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: February 20, 2023

Respectfully Submitted,

Rena Bilbro