

The Art of Appellate Advocacy - Farmer's route to the Supreme Court

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After recently reading an article in this newspaper that Deirdre "Dee" (formerly Douglas) Farmer, a self-described pre-operative transsexual prisoner, was being released from prison, I decided that the time had come to use some space in this column, which I will do starting next month, offering tips and suggestions on writing a petition for certiorari. Bear with me and I'll explain momentarily the connection between these seemingly unrelated subjects.

Farmer had been incarcerated since the mid-1980s after being convicted of committing several acts of credit card fraud, including a few that occurred while he was in prison, which appears to be the reason why now-Chief Judge Joseph F. Murphy, Jr., who signed the order releasing Farmer from Roxbury Correctional Institute, referred to Farmer as "incurable" when originally sentencing him for his misdeeds nearly 20 years before.

My familiarity with Farmer dates back to 1993 when, while I was serving as a fellow with the National Association of Attorneys General's Supreme Court Project, the court agreed to decide whether prison officials at the U.S. Penitentiary in Terre Haute, Indiana violated Farmer's rights under the Eighth Amendment to the U.S. Constitution by assigning him to the general prison population where, Farmer claimed, he was beaten and raped in his cell by another inmate.

I chose Farmer's case to satisfy a condition of my fellowship requiring me to write an amicus brief in a Supreme Court case involving issues of importance to the states, which, it seemed to me, would have a great interest in the constitutional standard that applies to inmate housing decisions their prison officials make on a daily basis.

Now some of you may be thinking, duh, whatever the standard may be, it has to be violated when a pre-operative transsexual prisoner is released into the general prison population. I know that's what I was thinking when I was first introduced to this case. The only time I had a worse case of Jewish guilt was when I defended on appeal state Medicaid officials who were sued for refusing to fund liver transplants for children. But that's enough about that experience.

As with many issues, the question presented by Farmer's case was a little more complicated than what appeared on the surface. It wasn't even necessary to look any further than Farmer's litigation history — which, as of the date of this article, includes 36 cases on Westlaw — to appreciate the nuances and subtleties presented by his claims.

Prior to suing officials at Terre Haute for placing him in that prison's general population, Farmer brought suit against prison officials at another penal institution because they did not give him such a housing assignment.

Claiming that his Eighth Amendment rights were violated when the warden and other high ranking officials at the federal penitentiary in Lewisburg, Pa., put him in administrative segregation, Farmer sued them after they determined that he would not be safe in that prison's general population. Go read *Farmer v. Carlson*, 685 F.Supp. 1335 (M.D.Pa. 1988), if you don't believe me. Truth is stranger than fiction.

It got even stranger for me, on a personal level, not long after I began writing the amicus brief and had spent a very long day at the office trying to construct the argument that a pre-operative transsexual prisoner was really no different from any other inmate with somewhat unique issues.

I had almost convinced myself with this argument, until I opened the door of my home and was greeted by a beaming 2-year-old, who enthusiastically called out "Hi daddy!" as he gracefully skipped down the stairs and did a mini-pirouette at the bottom. In his sister's maroon and blue striped dress. I took a picture of this true Kodak moment if you don't believe me. I also rewrote the argument the next day.

The Supreme Court ultimately adopted a standard very similar to the one proposed in the amicus brief that I filed on behalf of 35 states, but the most memorable part of the case, at least, to me, was not the court's decision on the merits of the controversy but rather the fact that the court decided to review the case in the first place.

Although representation by a high-powered law firm specializing in Supreme Court practice is no guarantee of success, it's a step in the right direction, but Farmer did not have the benefit of such counsel at the time he sought the Supreme Court's review of his case. In fact, as in the vast majority of the dozens of cases that Farmer has brought since being incarcerated, Farmer did not have any counsel when he filed the motion for leave to proceed in forma pauperis and the petition for certiorari that the Supreme Court granted in *Farmer v. Brennan*.

That's a pretty impressive accomplishment. I don't know how many lawyers you know who have succeeded in persuading the nation's highest court to review one of their cases, but my guess is that, for most of you, Farmer and Clarence Gideon probably exceed that number by two.

Farmer did not achieve the same level of success on the merits of his case that he did at the cert. stage — he lost after the Supreme Court sent the case back for further proceedings governed by a standard much more onerous than the one Farmer proposed. But just getting another chance to play the game is victory enough in my book.

The reason for Farmer's release from prison was not, unfortunately, the result of his success in one of the many civil rights cases he filed over the years, but rather because he is extremely ill, so much so that he will now be cared for by his mother. I have never met Farmer, but I have felt a distinct sense of sadness since learning this. Perhaps this is because, as I have come to realize after all of these years, he has had a difficult life and experienced hardships that I can only begin to imagine.

