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National Perspective

LAW

Decision Sought on Wider Right to Counsel After Conviction

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The justices of the U.S. Supreme Court will take up a case from Georgia on Friday that poses a stark question about the administration of the death penalty:

Does the Constitution require a state to provide a lawyer to an indigent death row prisoner who contends, at his first state habeas corpus hearing, that his constitutional rights were violated at trial?

In the landmark 1963 decision *Gideon vs. Wainwright*, the Supreme Court ruled that all people faced with jail are entitled to court-appointed lawyers if they cannot afford such representation. The high court also has held that there is a right to an attorney for the direct appeal of a conviction, which is limited to a review of the trial record.

However, the Supreme Court ruled a decade ago in a Virginia case that the states did not have to provide counsel for habeas corpus challenges—hearings in which defendants whose convictions and sentences have been upheld on direct appeal can raise broader, more complicated constitutional issues, including whether trial lawyers performed competently. A habeas corpus writ calls for ruling on the legality of a prisoner's detention.

The case now before the court involves Exzavious Lee Gibson.

In 1990, Gibson was convicted of a brutal murder. Five years later, the Georgia Resource Center—a state agency that advises lawyers representing death row inmates—hurriedly filed habeas corpus papers in Gibson's case and several others before new state rules tightening the deadlines for such proceedings took effect. Congress had just cut off federal

funding for the center, which had to lay off most of its lawyers.

So Gibson was on his own when he appeared before Judge J. Carlisle Overstreet in September 1996.

His current attorneys say that the transcript of that hearing illustrates the problem:

Judge: OK, Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

Judge: I understand that.

Gibson: I am not waiving my rights.

Judge: I understand that. Do you have any evidence that you want to put up?

Gibson: I don't know what to plead.

Judge: Huh?

Gibson: I don't know what to plead.

Judge: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this court.

Gibson: But I don't have an attorney.

The judge then asked Gibson two more times if he wanted to question the sole witness at the hearing—his former lawyer, whose competence was at issue. Gibson responded that he did not know what to ask.

Elizabeth Wells, a lawyer for the resource center, tried to get the judge to delay the proceedings to allow time for the center to get Gibson an attorney. The judge urged Wells to step in and represent Gibson. Wells replied that she was not prepared and could not handle the matter competently. The judge refused to grant a delay.

During the hearing, Gibson—whose IQ has been measured between 76 and 82—offered no evidence, questioned no witnesses and raised no objections.

Six months later, Overstreet upheld the verdict and sentence against Gibson. Nearly two years later, the Georgia Supreme Court upheld Overstreet.

The lawyers who volunteered to help Gibson after his habeas hearing—Joseph Blankfort and Courtland Reichmann of Atlanta—contend that the case

they are bringing to the Supreme Court is distinct from the Virginia case in which the court ruled that counsel need not be provided.

In that case, Justice Anthony M. Kennedy—who cast a critical vote for the majority—emphasized that key to his decision was that Virginia law provided for appointed counsel and that all death row inmates there had gotten attorneys for their habeas hearings.

Georgia has no such law.

The effort to get the Supreme Court to review Gibson's case is getting support from the American Bar Assn., the NAACP Legal Defense and Education Fund and the Atlanta-based Southern Center for Human Rights, which specializes in death penalty appeals. All three groups maintain that Gibson's case has broad ramifications. They say that without a lawyer, the ancient writ of habeas corpus is rendered virtually meaningless.

Since the reinstatement of capital punishment in 1976, 80 people—including three from Georgia—who had been sentenced to die have been exonerated, mostly as a result of newly discovered evidence or constitutional violations that emerged during habeas proceedings.

All of those individuals were represented by attorneys, said Elisabeth Semel, who heads the ABA's Death Penalty Project in Washington, D.C.

In addition, a brief filed by Stephen B. Bright of the Southern Center documents that attorneys representing condemned inmates in Georgia have proved constitutional error, requiring new trials or new sentencing hearings, in more than half that state's death penalty cases since 1976.

Most states, including California, provide counsel for indigent defendants at habeas hearings, either because of court rules or by statute. Indeed, the Mississippi Supreme Court recently ruled that there is a constitutional right to such representation.

"The reality [is] that indigent death

row inmates are simply not able, on their own, to competently engage in this type of litigation," the Mississippi justices said. "Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state provided remedy."

But the Georgia Supreme Court went the other way in a 4-3 ruling last April, agreeing with the state attorney general that it was not "fundamentally unfair" to deny Gibson a state-funded lawyer at this stage of his case.

"We do not say that a law providing state-funded counsel to indigent death row habeas petitioners lacks merit. In fact, such a law might be good policy," the majority said. But enactment of such a law is for the Legislature to do, not judges, the court concluded.

If the Supreme Court agrees to take Gibson's case, there will be a full review of the right-to-counsel issue. If it declines to take the case, then his lawyers likely would raise constitutional challenges to his conviction and sentence in federal habeas proceedings. But that effort could be in vain.

George H. Kendall of the NAACP Legal Defense Fund noted that recent Supreme Court rulings and new federal laws have significantly elevated the importance of finding and presenting all relevant facts in the first state habeas hearing. When that doesn't happen, Kendall said in a friend-of-the-court brief, unrepresented defendants, like Gibson, who have not raised any issues may forfeit potentially meritorious claims.

Indeed, as Gibson's habeas hearing ended, Overstreet asked Georgia Assistant Atty. Gen. Paige Reese Whitaker whether she knew of "any other rights or advice we need to give Mr. Gibson."

Whitaker, who specializes in death penalty cases, responded: "I think Mr. Gibson should be aware that this is his first habeas corpus proceeding and that if he chooses to file another one, anything that he doesn't raise in this one is going to probably be found to be waived under Georgia law."

Drawing:

The Supreme Court is being asked to rule that a man on death row should have had a lawyer for an appeal.

ID NUMBER: 19991007hmn0062

Photo:

Exzavious Lee Gibson was convicted of murder but his attorney's competence has been questioned.

ID NUMBER: 19991007fj7f8mgj

Photographer:

Georgia Diagnostic and Classification Center

Descriptors

CAPITAL PUNISHMENT — GEORGIA;
SUPREME COURT (U.S.);
MURDERS — GEORGIA;
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