

# Los Angeles Times

28 inches; 998 words

TUESDAY, AUGUST 14, 2001, PART A, PART A, PAGE 10  
COPYRIGHT 2001 / THE TIMES MIRROR COMPANY

000065919  
FAX page #1

## THE NATION

### Ruling on Sleeping Lawyer

■ Court: Texas man facing execution will get another trial because his lawyer was unconscious during the first one.

By HENRY WEINSTEIN  
TIMES LEGAL AFFAIRS WRITER

A federal appeals court Monday blocked Texas from executing a man whose lawyer slept through substantial parts of his 1984 murder trial in Houston.

Last year, a smaller appeals court panel cleared the way for Texas to execute Calvin J. Burdine, even though his lawyer, Joe Frank Cannon, had fallen asleep through much of his trial.

Texas officials under both then-Gov. George W. Bush and his successor had argued that the sleeping lawyer did not violate Burdine's constitutional rights.

But in a 9-5 ruling, the full U.S. 5th Circuit Court of Appeals disagreed. There is a "fundamental unfairness in Burdine's capital murder trial created by the consistent unconsciousness of his counsel," Judge Fortunato P. Benavides wrote for the majority.

"Unconscious counsel equates to no counsel at all," he added.

During last year's presidential election, Bush was asked about the Burdine case, which to death penalty foes had come to symbolize their objections to the way in which capital cases were handled in Texas. Bush defended the state's conduct in death penalty cases, saying its system worked properly to identify those who were guilty.

#### Damage of Defendant's Case Is Debated

Texas officials have argued in court that to gain a new trial, Burdine would have to prove not only that Cannon was asleep, but that he slept through critical points in the trial. Burdine would then have to prove that his lawyer's sleeping during those particular times damaged his case, they argued.

But the appeals court rejected that idea, saying that the findings of a Texas trial judge, who held a hearing in 1995 into Cannon's conduct, proved enough.

"When a state court finds on the basis of credible evidence that defense counsel repeatedly slept as evidence was being introduced against a defendant, that defendant has been denied counsel at a critical stage of his trial," the court ruled. In such a case, the law presumes that "counsel's unconsciousness prejudiced the defendant," Benavides wrote in the ruling. The case is *Burdine vs. Johnson*, No. 99-21034.

The decision means that Burdine is entitled to a new trial. However, it is possible the Texas attorney general's office could seek a review by the U.S. Supreme Court.

A spokesman for the attorney general's office Monday said only that the attorneys for the state were "studying the court's ruling."

Four of the judges in the majority, including Benavides, were appointed by Bill Clinton, one by Jimmy Carter, two by Ronald Reagan and two by George Bush.

All five dissenters, led by Judge Rhesa H. Barksdale, a Reagan appointee, were appointed by Republican presidents. Two of the dissenters, Emilio M. Garza and Edith H. Jones, are often mentioned as potential Supreme Court nominees under George W. Bush.

In the dissent, Barksdale said that while the trial record reflected periods of inactivity, it did not prove that Cannon was necessarily sleeping. It is possible, he wrote, that Cannon merely appeared to be asleep as part of a "trial strategy."

During his career, 10 of Cannon's clients wound up on death row in Texas. He slept in at least one other of those cases; that client has been executed.

#### Delay in the Raising of Sleep Issue Questioned

The dissenters also argued that not all stages of a death penalty trial are critical. The majority's ruling ignores the question of "whether the evidence being

presented while counsel slept was harmful to the defendant's interests, or whether counsel could have done anything to improve the defendant's circumstances had he been alert," Barksdale wrote.

Barksdale also sharply criticized Burdine for waiting 11 years after the trial before first raising the sleeping issue and for failing to testify about anything he noticed about Cannon's performance.

In a separate dissent, Judge E. Grady Jolly wrote that Burdine was plainly guilty and had even complimented Cannon after the case ended.

"There is no suggestion in the record that Burdine suffered any prejudice on account of counsel's alleged sleeping," Jolly wrote. "I am led to believe that the 'sleeping lawyer' claim is in large part a diverting tactic to create the impression of a miscarriage of justice in a case in which substantial justice has been done."

In his majority opinion, Benavides wrote that the findings made during a 1995 hearing "demonstrate that Burdine's counsel was repeatedly asleep, and hence unconscious, as witnesses adverse to Burdine were examined and other evidence against Burdine was introduced."

As long ago as 1932, in a ruling arising out of the infamous Scottsboro Boys case in Alabama, the U.S. Supreme Court had said that a defendant in a capital case was entitled to "the guiding hand of counsel at every stage of the proceedings against him," the majority opinion noted.

Barksdale and Jones formed the two-judge majority on an earlier 5th Circuit panel that ruled 2 to 1 that Burdine was not entitled to a new trial because he had not proved that Cannon's sleeping actually had harmed him. Benavides was the dissenter at that stage.

The panel's ruling was chastised in editorials in major Texas newspapers and in other newspapers around the country. Soon thereafter, in response to a motion by Burdine's current lawyers, the full appeals court granted a rehearing,

which led to Monday's ruling.

Burdine was convicted in 1984 of murdering his former roommate W.T. Wise, whose body was found in the bedroom of a trailer with two stab wounds in the back, hands tied with a cord. Burdine conceded long ago that he and a friend went to rob Wise. But Burdine denies participating in the killing. His co-defendant, Douglas McCreight, pleaded guilty to a lesser charge and was paroled after eight years, even though evidence introduced at trial pointed to him as the principal perpetrator.

Burdine's quest to get off death row gained steam in 1995, when Judge Jay Burnett, a Texas state judge, conducted a hearing and recommended a new trial because of Cannon's failure to stay awake.

Burnett cited testimony of the court clerk who stated under oath that Cannon "fell asleep for long periods of time during the questioning of witnesses." She said that at one point Cannon fell asleep for "at least 10 minutes" and that there were "lots of incidents" when Cannon dozed off for shorter periods. A juror testified at the time that Cannon "would nod his head down, bob it, with eyes closed."

The Texas Court of Criminal Appeals, however, disagreed with Burnett, saying Burdine's execution could go forward. Burdine's attorneys then launched an attack on his conviction in federal court. In 1999, a federal judge in Houston said he was entitled to a new trial, ruling that "a sleeping counsel is equivalent to no counsel at all."

Burdine's appellate attorney, Robert McGlasson, hailed Monday's ruling.

"Today, finally, common sense prevailed," McGlasson said. "The full court affirmed what we have said all along: namely that a sleeping attorney is no attorney and that a death penalty trial conducted under these circumstances violates basic notions of fairness and decency."

□

#### MORE INSIDE

Sleeping counsel: Texas court blocks execution because inmate's lawyer dozed during trial. A10

#### Descriptors

COURT OF APPEALS (U.S.);  
COURT RULINGS;  
EXECUTIONS — TEXAS

---

#### NOTE:

May not be reproduced or retransmitted without permission.

For permission, call:  
800 LA TIMES, Ext. 74564.

□