

US Supreme Court reinstates death sentence against Tennessee man

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In a decision that will further restrict the right of death row inmates to appeal their sentences, the US Supreme Court reversed a lower court ruling and reinstated the death sentence of a Tennessee man who argued that his mentally ill lawyer did nothing to save him from the death penalty. In an 8-1 vote on May 28, the Supreme Court overturned a federal appeals court ruling that had granted the man's writ of habeas corpus and set aside his death sentence.

Gary Bradford Cone, a Vietnam veteran who suffers from Post-Traumatic Stress Disorder (PTSD), was convicted of first degree murder in 1982 for the beating deaths of an elderly Memphis, Tennessee couple, Shipley and Cleopatra Todd. At Cone's capital trial, his lawyer failed to present any mitigating evidence on his client's behalf and made no closing argument. The defense attorney, John Dice, was diagnosed with mental illness and subsequently committed suicide.

The US Court of Appeals for the Sixth Circuit, in Cincinnati, Ohio, had granted Gary Cone's petition for a writ of habeas corpus on the grounds that his lawyer's handling of the sentencing hearing was so deficient that it violated the Sixth Amendment right to effective assistance of counsel. The Supreme Court overturned this federal court ruling, sending the case back to the lower court.

This decision is the high court's latest interpretation of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which was signed into law by Clinton in 1996. The law seeks to "streamline" the death penalty appeals process, significantly restricting the jurisdiction of federal courts to review state court decisions through habeas corpus petitions. Under the law, federal courts are blocked from granting habeas corpus petitions unless state court decisions "resulted in a decision that was contrary to, or involved an unreasonable

application of, clearly established federal law" as defined by Supreme Court precedents.

The majority of Supreme Court justices chose to apply the precedent of *Strickland v. Washington*, which requires not only that a lawyer's performance falls "below an objective standard of reasonableness," but that the outcome would have been different if the defendant had been represented by effective counsel. In other words, the constitutional right to effective counsel can be disregarded if, in the justices' opinion, Cone would have received the death penalty even if John Dice had mounted an aggressive defense.

In granting Gary Cone's habeas corpus writ, the Sixth Circuit wrote: "Here ... the only conceivable goal, was to persuade the jurors not to sentence Cone to death. How counsel's refusal even to ask the jurors to do that could be called a reasonable strategy to achieve the goal, eludes us." In his lone dissenting opinion in the Supreme Court ruling, Justice John Paul Stevens argued that the Sixth Circuit had correctly applied the precedent of *United States v. Cronin*, which presumes that a lawyer who "entirely fails to subject the prosecution's case to meaningful adversarial testing" has been ineffective.

Justice Stevens wrote: "There are rare cases in which blind reliance on (the presumption that the lawyer performed adequately) or uncritical analysis of proffered explanations for aberrant behavior in the courtroom may result in the denial of the constitutional right to the effective assistance of counsel." Stevens added: "The importance of protecting this right in capital cases cannot be overstated."

Chief Justice William Rehnquist, writing for the majority, made the highly debatable claim that the defense attorney's failure to make a closing statement could be seen as a "tactical decision about which

competent lawyers might disagree,” because it denied the prosecutor the right to make a rebuttal argument before the jury retired for deliberations.

But in fact, by failing to make a closing argument, defense attorney John Dice deprived the jury of information about Gary Cone that could have influenced their decision on whether or not to sentence him to death. Cone admitted he had killed the elderly couple, but claimed he was insane because of a drug addiction and stress from service in Vietnam.

Gary Cone was interviewed by Shirley Dicks for her book *From Vietnam to Hell: Interviews with Victims of Post-Traumatic Stress Disorder* (McFarland & Company, 1990). Cone’s description of his wartime experience is similar to that of many Vietnam veterans, who are disproportionately represented in US prisons, and on death row in particular:

“I was nineteen years old and the Vietnam war was the high point in my life. I didn’t come home in a body bag or a wheel chair. Even though I had come home a complete person, it’s evident that I didn’t.”

In *From Vietnam to Hell*, Cone recounts his memory of the brutal 1982 murder: “I broke into a house, entering from the back door. When I left, two people inside were dead. I don’t remember killing them, but I know I must have. All I can remember is the police chasing me. I thought I was in the jungle, and the CONG chasing me, trying to kill me before I could kill them.”

While ruling in Gary Cone’s case, the Supreme Court has deferred action in another death penalty appeal which raises similar issues. Texas death row inmate Calvin Burdine appealed his 1984 murder conviction claiming his lawyer, Joseph Cannon, slept through critical portions of his trial. The Fifth Circuit Court of Appeals, in New Orleans, ruled in August 2001 that Burdine was denied his right to adequate legal representation because his lawyer was sleeping. Texas appealed the ruling to the US Supreme Court.

Details of Burdine’s case indicate his lawyer’s nodding off at trial may have adversely impacted the trial outcome. Calvin Burdine was convicted in the April 1983 murder of W.T. Wise in Houston. Burdine admits to being present when Wise was murdered in the course of a robbery, but there is compelling evidence that an accomplice, Douglas McCreight, was actually the murderer. McCreight, who pled guilty to murder,

did not receive the death penalty and was released from prison on parole after serving eight years. Burdine, who pled not-guilty, was convicted and sentenced to death. The question is whether Calvin Burdine’s lawyer, asleep in the courtroom, was able to provide “effective counsel” taking into account all the evidence.

Sleeping lawyers, as well as those who are intoxicated or high on drugs during trial, have been cited by death penalty opponents as some of the most egregious examples of ineffective, court-appointed legal representation for capital defendants who cannot afford to pay for an attorney.

Diann Rust-Tierney, director of the American Civil Liberties Union (ACLU) Capital Punishment Project, commented: “Sleeping lawyers epitomize a recurring problem of inadequate legal representation for death row inmates. Few states provide adequate funds to compensate lawyers for their work or to investigate cases properly. Consequently, capital defendants are relegated to lawyers who are notoriously inexperienced, often over-worked and in many cases incompetent.”



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