Federal Judge Declares Habeas Corpus Is "Dead In This Country"

It is increasing rare in the United States that one hears a state or federal judge plainly tell the truth in a dissenting opinion about the misjustice perpetrated by the majority of a court's members against a person who by any rational understanding of right and justice deserves to have their conviction overturned or their sentence reduced. U.S. Circuit Court Judge James C. Hill's dissent in the 11th U.S. Circuit Court of Appeals *en banc* ruling in the case of *Ezell Gilbert v. United States* (2011) qualifies as one of those occasions when a judge simply can no longer contain the sense of outrage fueled by the extreme mistreatment of a person that is carried out in the name of the law. Judge Hill wrote that the court's majority ruling "confirms what I have long feared. The Great Writ [of *habeas corpus*] is dead in this country." Two other judges also wrote strongly worded dissents that the Court's ruling amounted to an unconstitutional suspension of *habeas corpus*.

In 1996 Ezell Gilbert pled guilty to several federal drug charges, one of which involved him carrying a concealed firearm. During his sentencing hearing in 1997 the judge ruled that carrying a concealed firearm was a "crime of violence" that made the "career offender enhancement" applicable to Gilbert. Gilbert's lawyer objected to the judge applying the "career offender enhancement" that increased his sentence from a maximum of 13-1/2 years under the federal sentencing guidelines to 24-1/3 years in prison.

Gilbert's appeal of his sentence was denied by the 11th Circuit and the U.S. Supreme Court declined to review his case. Gilbert then filed a *pro se* post-conviction §2255 petition that was denied in 2003.

In response to a U.S. Supreme Court ruling in 2008 that clarified what could be considered a "crime of violence" triggering the "career offender enhancement" to a sentence, the 11th Circuit also ruled in 2008 that carrying a concealed firearm was not a "crime of violence" for purposes of applying the "career offender enhancement."

Gilbert then filed a petition seeking to reopen his original §2255 post-conviction petition. He argued that he was entitled to have his sentence vacated and to be resentenced because the U.S. Supreme Court and the 11th Circuit agreed that the career offender enhancement didn't apply to his case -- which is exactly what Gilbert's lawyer argued during his sentencing hearing and in his appeal to the 11th Circuit that was denied in 1998. With good-time credits Gilbert would have to serve about 11-1/2 years on a 13-1/2 year sentence, so without the enhancement Gilbert's sentence would be complete.

The district court ruled that Gilbert's §2255 petition was a *de facto* successive petition and not a continuation of his original petition. Since §2255 of the Anti-Terrorism and Death Penalty Act of 1996 (AEDPA) bars a successive petition in circumstances such as Gilbert's, the judge denied Gilbert's petition without considering the merits of his claim that his sentence was illegal.

Gilbert appealed to the 11th Circuit. In reversing the district court's ruling, a 3-judge panel decided that Gilbert could pursue his claim of being illegally sentenced in a *habeas corpus* petition filed under 42 U.S.C. §2241, instead of pursuing his claim in a post-conviction petition under §2255 of the AEDPA.

The U.S. Department of Justice then filed a motion for an *en banc* hearing of Gilbert's case by all the 11th Circuit's judges, which was granted. On May 19, 2011 the 11th Circuit Court decided by an 8 to 3 majority to affirm the district court judge's denial of relief to Gilbert. In *Gilbert v. United States*, No. 09-12513 (11th Cir., 5-19-2011) the Court did agree, as did the US Department of Justice, that the "career offender enhancement" that almost doubled Gilbert's sentence would not be applied to his case if he were sentenced today. However, the Court ruled that §2255 bars Gilbert from filing a successive petition, and the doctrine of finality that encourages keeping a case closed bars creating an exception in Gilbert's case that would allow him to instead file a *habeas corpus* petition. The Court's ruling expressed concern that allowing an exception for Gilbert could result in an unknown number of prisoners to pursue resentencing because he or she was illegally sentenced as a "career offender" when the enhancement did not apply to their case.

All three judges who dissented wrote an opinion.

Circuit Judge Beverly B. Martin wrote that by denying Gilbert the opportunity to even have his claim of being illegally incarcerated heard the Court was raising the constitutional question of whether its interpretation of the AEDPA "constitutes a suspension of the writ [of *habeas corpus*] in violation of Article I, § 9, cl. 2 of the United States Constitution." (*Op. Cit*. 89) Judge Martin concluded her lengthy dissent with the following:

> For the reasons set out above, I see no impediment imposed by statute or legal precedent which prevents this court from correcting the mistake we made in Mr. Gilbert's case so long ago. To the contrary, I see it as our duty to do so.
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> Finally, I do not share the majority's concern that giving Mr. Gilbert relief under these extraordinary circumstances will open the floodgates to other prisoners. Indeed if there are others who are wrongfully detained without a remedy, we should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this? But what is important today is the consequence to Mr. Gilbert of our unwillingness to correct our past legal error." (*Op. Cit*. 101)

Circuit Judge Rosemary Barkett wrote in her dissent that the Court's ruling amounted to an "unconstitutional suspension of the writ of *habeas corpus*. In this case, there can be no dispute that Gilbert, through no fault of his own, has been denied a meaningful opportunity to challenge the legality of his detention." (*Op. Cit*. 86-87)

The strongest criticism of the Court's ruling was by Circuit Judge James Hill. Judge Hill functioned as a whistleblower in his dissent because it is one of those rare instances when an insider dares to openly describe the questionable conduct by the judicial bureaucracy he is a part of without the normal filter of trying to dignify what it has done by using neutral words that amount to trying to put lipstick on a pig. Judge Hill's four-page dissent follows in its entirety:

> Ezell Gilbert's sentence was enhanced ... as the result of his being found by the district court – reluctantly and at the explicit urging of the government – to be a career offender. Ezell Gilbert is not now, nor has he ever been, a career offender. The Supreme Court says so.
>
> Today, this court holds that we may not remedy such a sentencing error. This shocking result – urged by a department of the United States that calls itself, without a trace of irony, the Department of Justice – and accepted by a court that emasculates itself by adopting such a rule of judicial impotency – confirms what I have long feared. The Great Writ is dead in this country.
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> Gilbert raised his claim of sentencing er-

Habeas cont. on p. 18

Habeas cont. from p. 17

ror to every court he could, every chance he got. No court correctly resolved his claim until the Supreme Court made clear that Gilbert's claim was meritorious – he was never a career offender. Now, he has come back to us for relief from his illegal confinement. Our response to him is that he cannot apply for relief under § 2255 because he has done so before, and, although we erroneously rejected his claim, the statute does not permit such reapplication. Of course, had he not applied for § 2255 relief, we would be holding now that he had procedurally defaulted his claim by failing to raise it before.

This "Catch-22" approach to sentencing claims is nothing more than a judicial "gotcha." Through our self-imposed limitations, we have found a way to deny virtually all sentencing claims. We do this, avowedly, in the pursuit of "finality." But, in so doing, we cast a pall of unconstitutionality over the otherwise beneficial provisions of § 2255.

Furthermore, to "seal the deal" on finality, we hold today that even the savings clause of § 2255 – which appears to permit resort to the Great Writ itself in circumstances such as these – provides no avenue to relief for Gilbert because confinement pursuant to sentencing errors such as his does not offend the Constitution. Rather than acknowledging that Gilbert's sentence is fundamentally defective and a miscarriage of justice, we hold that the error resulting in an additional eight and one-half years of prison time for Gilbert is a mere technicality, a misapplication of the Guidelines that has no remedy because it is not all that important. Gilbert's erroneous enhancement as a career offender – demanded by the government at the time – is argued to be mere harmless error now that he has been proven right.

The government even has the temerity to argue that the Sentencing Guidelines enjoy some sort of legal immunity from claims of error because they are not statutes at all, but mere policy suggestions. And the majority appears not to understand that Gilbert's imprisonment – no matter how his sentence was calculated – is the act of the Sovereign, who is forbidden by our Constitution to deprive a citizen of his liberty in violation of the laws of the United States.[2]

I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement. Case closed. Move on to the next. Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim. Gilbert has never had this opportunity.

A judicial system that values finality over justice is morally bankrupt. That is why Congress provided in § 2255 an avenue to relief in circumstances just such as these. For this court to hold that it is without the power to provide relief to a citizen that the Sovereign seeks to confine illegally for eight and one-half years is to adopt a posture of judicial impotency that is shocking in a country that has enshrined the Great Writ in its Constitution. Surely, the Great Writ cannot be so moribund, so shackled by the procedural requirements of rigid gatekeeping, that it does not afford review of Gilbert's claim.

Much is made of the "floodgates" that will open should the court exercise its authority to remedy the mistake made by us in Gilbert's sentence. The government hints that there are many others in Gilbert's position – sitting in prison serving sentences that were illegally imposed. We used to call such systems "gulags." Now, apparently, we call them the United States.

One last thought. The majority spends an enormous amount of time arguing that Gilbert is not a nice man. Perhaps. But neither, I expect, was Clarence Gideon, the burglar, or Ernesto Miranda, the rapist. The Supreme Court managed to ignore this legal irrelevancy in upholding the constitutional principle under attack in those cases. Would that we could have also.

I respectfully dissent from the majority's holding. With the addition of these thoughts of my own, I join in both Judge Barkett's and Judge Martin's dissents. (*Op. Cit*. 102-105)

Judge Hill was also very critical in a footnote about the government's suggestion in its brief that although it was arguing Gilbert had no legal recourse to correct what it conceded was his illegal sentence and continued imprisonment, "an application for clemency by Gilbert might be favorably received by the government." Judge Hill wrote that the government's position "mocks our constitutional guarantees by implying that they are gifts that may be bestowed or withheld at the whim of the Sovereign." (Fn 2)

Although the 11th Circuit's majority opinion tried to undermine Judge Hill's claim that "The Great Writ is dead in this country" by citing several cases in which *habeas corpus* was granted in the past 10 years (but none in the 11th Circuit), the opinion completely ignored that for Gilbert and other federal prisoners illegally sentenced and imprisoned as a "career offender" *it is dead* because the 11th Circuit will not allow it to be used to free them.

A week before the ruling in Gilbert's case was anounced, the American Bar Association honored Judge Hill, 87, with its Pursuit of Justice Award.

Sources:
Gilbert v. United States, No. 09-12513 (11th Cir., 5-19-2011)
Judge James C. Hill is Recipient of ABA's Pursuit of Justice Award, American Bar Assoc Press Release, May 12, 2011

Federal Judge Reverses Jury Award Of $18.6 Million To Alan Newton For 12 Years Imprisonment

Alan Newton after his release in July 2006.

Alan Newton was arrested in 1984 for the rape, robbery and assault of a 25-year-old woman in New York City's Bronx borough. The victim identified Newton from a photo lineup, and she later identified him from a live lineup.

Newton's alibi defense during his trial in 1985 was that on the evening of the crime he went to a movie in Brooklyn with his fiancé, her daughter, and other relatives, and he spent the night at his fiancé's home in Queens — which is about 10 miles from the Bronx. The victim identified Newton in court and the jury convicted him. Newton was sentenced to 13-1/2 to 40 years in prison.

In 1994 Newton sought DNA testing of the victim's rape kit that included the assailant's semen, but the judge denied it because the prosecution said the rape kit couldn't be located. Newton again sought DNA testing in 2005. The Property Clerk's Office initially reported, as it had for almost 12 years, that the rape kit couldn't be found, but it was eventually located in a warehouse. Testing of the semen in March 2006 determined that Newton's DNA did not match that of the assailant. Based on that new evidence his conviction was overturned and he was released from prison on July 6,

Newton cont. on p. 19