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

Newton cont. from p. 18

2006, after almost 22 years of incarceration from the time of his arrest.

Newton filed a federal civil rights lawsuit against the City of New York, the New York City Police Department and several officers, alleging among other claims that their conduct constituted reckless disregard for Newton's constitutional right to due process because the city's system for safeguarding DNA evidence and a defendant's access to it was inadequate. After a 3-1/2 week trial, on October 19, 2010 the jury awarded Newton a total of $18,592,000 for 12 years of wrongful imprisonment from 1994 when he first sought the DNA testing of the rape kit that the NYPD claimed it couldn't locate, to 2006 when he was released.

The city filed a motion challenging the verdict. On May 12, 2011 U.S. District Court Judge Shira A. Scheindlin reversed the jury's verdict, ruling that Newton had proved the city acted negligently, but not that any city employee had intentionally violated his constitutional rights by withholding evidence for DNA testing. In her 31-page ruling Judge Scheindlin wrote that Newton had not proved any city employees "withheld evidence in deliberate contravention or disregard of his right to due process. Newton's due process claim cannot be sustained absent proof that a city employee acted with the requisite constitutional culpability in withholding evidence." Judge Scheindlin wrote, "It is not enough for Newton to have shown that the city's post-trial evidence management system is disorganized. As disturbing as such negligence may be, in the end that is what it is: mere negligence."

Newton told reporters after the ruling, "I'm totally shocked. The city's saying I'm not entitled to anything, and no one has to answer for what happened to me anymore. ... This is the last thing I expected."

Newton's lawyer, John Schutty told reporters he would appeal the judge's ruling that he thinks is contrary to the evidence the jury relied on in making their award, because "The Police Department had the evidence in their possession during the 12 years he repeatedly requested it and they didn't produce it."

See *Justice Denied's* article about the jury's $18.592 million award in October 2010.

Sources:

$18.5 Million Lawsuit Taken From Wrongfully Convicted Man, *The St Louis American*, May 17, 2011

Ruling Blocks $18.5 Million to Man Freed in Rape Case, *The New York Times*, May 12, 2011

Judge nixes $18.5 million award for Alan Newton, man jailed for 22 years for rape he didn't commit, *New York Daily News*, May 12, 2011

Dominique Strauss-Kahn's Rape Charges Dismissed Because There Is No Evidence A Crime Occurred

After Dominique Strauss-Kahn's had resigned as managing director of the International Monetary Fund and his character assassinated by the media that also all but tried and convicted him of raping a hotel maid in New York City in May 2011 — the truth emerged that the maid has so little credibility that the charges were dismissed on August 23, 2011.

Strauss-Kahn's photo was plastered on the front page of newspapers and websites all over the world when he was arrested on May 14, 2011 for allegedly raping Nafissatou Diallo, a maid at the Sofitel New York, a luxury hotel in Manhattan where he was staying. At the time Strauss-Kahn was the managing director of the International Monetary Fund and a leading candidate for the French presidency. *The Telegraph* of London reported that because of the allegations Strauss-Kahn "has been destroyed overnight." Four days after his arrest he resigned from the I.M.F.

Diallo's original account of the alleged assault was so strange that it raised red flags about its believability for people who retained an open mind: Why would a multi-millionaire and one of the most powerful men in the world staying in a $3,000 a night hotel suite allegedly pursue a not very attractive hotel maid to force her to have sex with him when he could have a callgirl in New York City as easily and quickly as ordering a Dominos Pizza?

Nafissatou Diallo in July 2011

Strauss-Kahn, 62, was indicted on May 19, 2011 for two counts of first-degree criminal sexual act, first-degree attempted rape, first-degree sexual abuse, second-degree unlawful imprisonment, third-degree sexual abuse, and forcible touching. Later that day a judge ordered that he could be released on house arrest after posting a $6 million bail — $1 million in cash with an additional $5 million in collateral.

Inconsistencies began to be reported in Diallo's account of the alleged assault, and on July 2 the judge lifted Strauss-Kahn's house arrest restriction.

Dominique Strauss-Kahn

Although Diallo had denied to prosecutors that she had a financial motive for accusing Strauss-Kahn of rape, on August 8 she filed a civil lawsuit in New York's State Supreme Court in the Bronx. The lawsuit sought unspecified damages for what it alleged was Strauss-Kahn's "senseless attack on Ms. Diallo has caused her to suffer both physical and psychological harm, as well as permanent harm to her professional and personal reputations, and severe mental anguish and emotional distress, from which she may never recover."

Then on August 22, 2011 Manhattan's District Attorney filed a "Recommendation For Dismissal" of the charges against Strauss-Kahn. The prosecution's request for dismissal extensively details that Diallo is a pathological liar with no credibility whatsoever. Among her lies is a detailed story she fabricated for her application for asylum in the United States about being gang raped in Guinea. When confronted by prosecutors with evidence that she hadn't been truthful Diallo admitted she lied to the grand jury that indicted Strauss-Kahn. Since there was no evidence Diallo had been raped other than her claim — and she told investigators three different and conflicting stories of what allegedly happened — the prosecution simply had no basis to proceed with its case. The "Recommendation For Dismissal" stated in part:

> "For a host of reasons, including those set forth below, the complainant's untruthfulness makes it impossible to credit her. Because we cannot credit the complainant's testimony beyond a reasonable doubt, we cannot ask a jury to do so. The remaining evidence is insufficient to satisfy the elements of the charged crimes. We are therefore required, as both a legal and ethical matter, to move for dismissal of the indictment." (11)

After the charges were dismissed the next day he issued a Statement that said in part:

> "These past two and a half months have been a nightmare for me and my family. I want to thank all the friends in France and in the United States who have believed in my innocence, and to the thousands of people who sent us their support personally and in writing. I am most deeply grateful to my wife and family who have gone through this ordeal with me."

Strauss-Kahn cont. on p. 20