

Thursday, May 17, 2007

**Hurdles and more hurdles to getting a habeas corpus hearing.**

Death penalty: Always unjust. A 5-4 Supreme Court majority is satisfied to give a trial judge carte blanche whether to grant a habeas corpus/post conviction hearing to a death row inmate complaining that his trial lawyer was ineffective for following his instructions not to present mitigating evidence at sentencing. *Schribo v. Landrigan*, \_\_\_ U.S. \_\_ (May 14, 2007). Wisely, speaking for the four-member minority, Justice Stevens retorted: "Significant mitigating evidence" evidence that may well have explained respondent's criminal conduct and unruly behavior at his capital sentencing hearing "was unknown at the time of sentencing. Only years later did respondent learn that he suffers from a serious psychological condition that sheds important light on his earlier actions. The reason why this and other mitigating evidence was unavailable is that respondent's counsel failed to conduct a constitutionally adequate investigation. See *Wiggins v. Smith*, 539 U. S. 510 (2003). In spite of this, the Court holds that respondent is not entitled to an evidentiary hearing to explore the prejudicial impact of his counsel's inadequate representation. It reasons that respondent 'would have' waived his right to introduce any mitigating evidence that counsel might have uncovered, ante, at 10, 13, and that such evidence 'would have' made no difference in the sentencing anyway, ante, at 14. Without the benefit of an evidentiary hearing, this is pure guesswork." Justice Stevens hits the nail on the head that we are talking here about whether to give a death row inmate a habeas corpus/post conviction hearing, and not whether the inmate should necessarily be granted any habeas corpus relief. *Schribo v. Landrigan*, \_\_\_ U.S. \_\_ (May 14, 2007). With this *Schribo* decision, we once again see a common alignment of the Supreme Court's justices on civil liberties issues. We have the four ordinarily more liberal justices, who are Justices Stephens (appointed by the non-liberal president Ford), Souter (appointed by the non-liberal Bush I), Ginsburg (appointed by Clinton, a former litigator for ACLU causes, and much more restrained than my stereotype of an ACLU lawyer), and Breyer (appointed by Clinton, but decidedly deferential to government efforts to carry out the business of administering and regulating). Solidly on the right are Justices Scalia (appointed by Reagan), Thomas (appointed by Bush I), Roberts, C.J. (appointed by Bush II), and Alito (appointed by Bush II). The usual swing vote is Justice Kennedy, who was appointed by Reagan only after he failed to get Bork confirmed (otherwise, the Supreme Court would be even more hostile to civil liberties than now) and then had an aborted nomination of still-current Court of Appeals (D.C. Cir.) Judge Douglas Ginsburg, who later revealed past use of marijuana, which leads me to want to see how that may have informed any decisions he has written on the subject. Left unsaid by the Supreme Court majority in *Schribo* is the extent to which they want to narrow any floodgates to federal court for habeas corpus petitions that might remain after last decade's enactment of the mis-nomored Antiterrorism and Effective Anti-Death Penalty Act (AEDPA), which already urinates too much on habeas corpus rights. The Supreme Court would not have taken this case had it merely intended to rule on the narrow issue of whether to give a habeas corpus hearing to complain about the trial lawyer's following the defendant's demand not to try to save the defendant from death. Jon Katz

Posted by Jon Katz in Criminal Defense at 00:05