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How to Define 'Interests of Justice'?

The Supreme Court's answer will decide the fate of a Missouri death row inmate.

Marcia Coyle, The National Law Journal

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The U.S. Supreme Court is being asked to put muscle behind its standard for substituting counsel in capital cases. The request is on behalf of a Missouri death row inmate whose appointed lawyers' conduct, according to legal ethics experts from around the country, amounted to malpractice.

Mark Christeson's case was "particularly egregious on a multiple-level way," said Lawrence Fox of Philadelphia's Drinker Biddle & Reath, founder and supervising attorney of the Ethics Bureau at Yale Law School.

Christeson's appointed lawyers missed the one-year deadline for filing his federal habeas petition by 117 days. They met him for the first time one month after that deadline had passed. After bringing in two experienced capital defense lawyers, they refused to share their files with them and fought the substitution-of-counsel request by the two out-of-state lawyers and Christeson himself, according to Christeson's court filings.

A federal district judge and the U.S. Court of Appeals for the Eighth Circuit turned away repeated attempts by Philadelphia's Jennifer Merrigan and New York's Joseph Perkovich to become Christeson's counsel. They'd argued his appointed lawyers were under a clear conflict of interest. Christeson is the only Missouri death row inmate to have been denied any federal review of his trial court judgment, Merrigan said.

"At every turn this case has gone badly. But is this enough to make the court stand up and be counted?" said Fox, who filed an amicus brief supporting Christeson on behalf of 43 legal ethics scholars and practitioners and Missouri capital habeas attorneys.

The high court granted a temporary stay of the inmate's execution on Oct. 28, pending action on his petition for review. Three justices — Antonin Scalia, Clarence Thomas and Samuel Alito Jr. — dissented. The high court will take a second look at his petition in *Christeson v. Roper* during its conference on Nov. 25.

'FALLING THROUGH THE CRACKS'

"Cases, including this one, are falling through the cracks of the system," said an amicus brief

coordinated by the nonpartisan Constitution Project on behalf of 17 former federal and state judges. "When the stakes are this high, such failures unacceptably threaten the legitimacy of the judicial process. The concern is heightened when, as here, courts respond with indifference, or appear partial to the prosecution."

Christeson's path through the federal courts began following his conviction in 2000 in the murders of Susan Brouk and her two children, according to court records. On July 2, 2004, two St. Louis-area solo practitioners were appointed to represent him in federal court proceedings: Eric Butts and Philip Horwitz.

Under the strict filing deadline set by the federal Antiterrorism and Effective Death Penalty Act, Christeson's federal habeas petition for review of his conviction and sentence was due on or before April 10, 2005. Butts and Horwitz, who did not respond to interview requests, filed the petition on Aug. 5, 2005. In 2007, a federal district court dismissed the habeas petition as untimely and said no extraordinary circumstances had been argued to justify equitable tolling of the deadline. The Eighth Circuit affirmed.

In April 2012, the Missouri Supreme Court issued an order to show cause by May 7 why Christeson should not be executed. Butts and Horwitz asked the local Death Penalty Litigation Clinic for advice about the equitable tolling of the one-year habeas deadline. The clinic staff steered them to Merrigan and Perkovich, who traveled to Missouri to meet with the appointed attorneys and Christeson, and to review the file.

During their meeting with Christeson, Merrigan and Perkovich said, they discovered he did not know his habeas petition had been dismissed seven years earlier. Additionally, he had filed two complaints about his appointed lawyers with the disciplinary office of the Missouri Supreme Court and had written twice to the Death Penalty Litigation Clinic for assistance. Butts and Horwitz apparently had visited Christeson four times in 10 years, and for years neither attorney accepted his calls, he told them, according to court records. He asked Merrigan and Perkovich to represent him.

The next day, Merrigan's petition says, the appointed attorneys refused to discuss or share Christeson's files, offering only his public defender's files. The appointed lawyers subsequently defended their representation in federal court and opposed substitution of counsel.

The U.S. Supreme Court in a unanimous 2012 decision in *Martel v. Clair* held that the correct standard for substitution of counsel in capital cases is the familiar "interests of justice."

'SIGNIFICANT CONFLICT OF INTEREST'

In Christeson's petition, Merrigan and Perkovich, along with their amicus supporters, contend that an actual conflict of interest meets the interests-of-justice test and requires substitution of conflict-free counsel. When counsel miss a crucial deadline, they argue, a "significant conflict of interest" arises, because the "strongest argument" for overcoming the default is the fact that the attorneys earlier abandoned him.

"From where we sit, this case presents a way for the court to begin to articulate a meaningful way to apply the interest-of-justice standard," Perkovich said. "It really is a source of ambiguity and uncertainty to litigants in [habeas] litigation across the country and, frankly, lower courts need help."

Missouri counters that Christeson's case does not meet the *Martel* test because the motion to substitute counsel was seven years too late; further litigation would be futile with new attorneys; and a claim of ineffective assistance of habeas counsel is not ground for relief. And, even if it were, the appointed lawyers' theory of when to file the habeas petition, while wrong, was not "unreasonable" under the standard the court set in *Strickland v. Washington* (1984).

"I wouldn't minimize the conflict," Kent Scheidegger, legal director of the conservative Criminal Justice Legal Foundation conceded. However, if substitution of counsel is based on the interests of justice, courts should consider whether there has been a miscarriage of justice, he added. "In this case, the guy is stone cold guilty. He's already had a very thorough review. I don't see stretching the rule just to review his habeas corpus petition."

But former Missouri Supreme Court Justice Michael Wolff, now dean of Saint Louis University School of Law, said, "The lawyers appointed for him missed the deadline. And when that happened, they should not have been in the case any longer."

Former U.S. District Judge Nancy Gertner agreed. "We are very careful in civil cases about conflicts of interest between the employee and the company. That's an abstraction at times," she said. "This is not an abstraction, and what hangs in the balance is execution."

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