



NOTEWORTHY NEWS

MISSOURI SUPREME COURT AFFIRMS
WALTER BARTON'S CONVICTION
AND SENTENCE AFTER AN
UNPRECEDENTED FIFTH CAPITAL
MURDER TRIAL

By a 4-3 vote, in an opinion authored by Judge Limbaugh, the Missouri Supreme Court affirmed Walter Barton's conviction and death sentence for the murder of an 81-year-old woman. This conviction and sentence was imposed after Barton's fifth trial for this murder. The most remarkable thing about the decision is the unusually forceful dissent authored by Judge Wolff, which will be quoted extensively later, in which he argues that the evidence was not legally sufficient to support either the conviction or death sentence and, in light of prosecutorial misconduct in earlier trials, double jeopardy principles should have precluded the fifth trial.

TWO MISSOURI STATE JUDGES
NOMINATED TO THE FEDERAL BENCH

President Bush recently nominated Missouri Supreme Court judge Steven Limbaugh for a vacant judgeship on the United States District Court for the Eastern District of Missouri. President Bush also nominated circuit judge David Kays to fill a vacancy in the District Court for the Western District of Missouri. Given the relatively short period of time before our lame-duck President's term expires and Democratic control of the Senate, the prospects of confirmation for

both candidates is questionable.

NEW JERSEY ABOLISHES THE
DEATH PENALTY

On December 17, 2007, Governor John Corzine signed a bill passed by both Houses of the legislature abolishing the death penalty in New Jersey. That state became the first state to do so in the post-Furman era. At the same time, Governor Corzine commuted the sentences of New Jersey's eight death row inmates to life without parole.

GOVERNOR BLUNT PLANS ELECTION
YEAR EXPANSION OF MISSOURI'S
DEATH PENALTY LAW

On February 14, 2007, Governor Matt Blunt released his plan to expand Missouri's death penalty law to allow the execution of persons convicted of the forcible rape of a child under 12 years of age. Similar laws had been enacted in a handful of other states in recent years. Louisiana's law, many observers believe, will be reviewed by the United States Supreme Court in a pending case. The law's prospects for getting through both houses of legislature is unclear. A cynic might argue that this legislation is merely an election year ploy by Governor Blunt to play "rope a dope" with his opponent Attorney General Jay Nixon. If Nixon comes out in favor of this bill, as his instincts and prior history would suggest, this position will undoubtedly cost him votes among the "democratic wing" of the democratic

IN THIS ISSUE

Noteworthy News... 1
U.S. Supreme Court... 2
Missouri Supreme Court... 2
Significant Decisions from the Eighth Circuit... 3
Significant Decisions from Other Circuits... 4

party in the general election. As some of you may remember, Nixon made a similar mistake of running on a law and order platform against Kit Bond for a Senate seat ten years ago, running ads accusing Bond of being soft on crime. On the other hand, if Nixon takes the sensible and more moderate approach and opposes this law as unnecessary and expensive, because Missouri's persistent sex offender and sexual predator laws mandate that the worst sex offenders already serve life without parole, this decision could cost Nixon votes in rural areas and among anti-Blunt Republicans. It makes you wonder if Karl Rove has come out of retirement and taken a part-time job in Jefferson City. In any event, the criminal defense bar needs to be prepared to effectively advance all of the sensible arguments against the passage of this unnecessary law.

OPT-IN UPDATE

As we reported in our last newsletter, experts had predicted that the opt-in regulations would clear all of its bureaucratic hurdles and go into effect sometime in the Spring of '08. The latest report is that the federal regulations Website indicates that "final action" on the opt-in regulations will occur in April 2008. Although it is not clear how reliable this posting is, it is also not clear whether "final action" means that the regulations would go to the OMB in April or that the regulations would already be back from OMB and be published in April. If the latter scenario is true, this would mean that states would be able to apply for opt-in status sometime in May, 2008. We will keep you posted of further developments.

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

Indiana v. Edwards, No. 07-208

In this case, the court granted certiorari to address the following question regarding a criminal defendant's Sixth Amendment right of self-representation: "May states adopt higher standard for measuring competency to represent oneself at trial than for measuring competency to stand trial?"

RECENT DECISIONS

Allen v. Siebert, 128 S.Ct. 2 (2007)

In this Alabama death penalty case, the court, in a per curiam opinion, reversed an Eleventh Circuit decision which had held that the one year statute of limitation had been tolled based upon the filing of an untimely state court petition. The Eleventh Circuit had held that *Pace v. DiGulielmo* was distinguishable because, under Alabama law, the timeliness of a state post-conviction petition is treated as an affirmative defense rather than as a jurisdictional requirement as in *Pace*. In reversing the Eleventh Circuit on this point, the Supreme Court held that *Pace* did not turn on the nature of the particular time limit relied upon by the state court, but rested instead on the fact that time limits generally establish conditions to filing a state post-conviction motion. Whether a time limit is categorized as jurisdictional, an affirmative defense, or something in between, it is a condition of filing and, an untimely petition does not toll the statute of limitations. Justices Stevens and Ginsberg dissented.

MISSOURI SUPREME COURT DECISIONS

State v. Barton, ___ S.W. 3d ___, 2007 WL 4110749 (Mo. banc 2007)

By a 4-3 vote, the Missouri Supreme Court, as previously noted, upheld the capital murder conviction and death sentence of Walter Barton for a 1991 stabbing of an 81-year-old female manager of a mobile home park in Ozark, Missouri. The majority rejected Barton's argument that the evidence was legally insufficient to support a guilty verdict and also rejected his argument under *State v. Chaney*, that the evidence was sufficiently tenuous that Barton's death sentence should be reduced to life without parole under Missouri's proportionality review statute. The majority also rejected Barton's argument that his trial and conviction was barred by the double jeopardy clause because of prosecutorial misconduct involving a snitch in a prior trial.

In addressing the sufficiency of the evidence claim, the majority held that the evidence was constitutionally sufficient to support Barton's conviction based upon circumstantial evidence that the victim's blood was found on defendant's shirt sleeve and that a jailhouse snitch named Katherine Allen testified that the appellant threatened to kill her "like he killed that old lady." The majority also noted that a check written to Barton by the victim, which had not been entered into her check register, which was found

nearby in a ditch, was also evidence of guilt, indicating that Barton “tried to rid himself of evidence tying him to the murder.”

The majority rejected Barton’s double jeopardy argument that involved governmental misconduct involving the snitch, Katherine Allen. The misconduct involved the fact that the prosecutor failed to disclose deals with the snitch involving her prior convictions that were found to constitute a *Brady* violation in a post-conviction proceeding involving Barton’s previous trial. The Court distinguished *Oregon v. Kennedy* because there was insufficient evidence to show that the prosecutor engaged in this misconduct for the purpose of avoiding an acquittal because the motion court made no findings on this issue in the prior post-conviction action. Instead, the panel majority stated that the prosecutorial misconduct “may just as well be attributed to poor judgment.”

The Court also rejected the argument that, in light of the weakness of the prosecution’s evidence of guilt, that Barton’s death sentence should be overturned under *Chaney*. The majority distinguished the Court’s prior decision to overturn Chaney’s death sentence because Chaney turned not only on the weakness of the state’s evidence, but also on the fact that Chaney had no prior record and presented other mitigating evidence that he was a good family man and that he had a good reputation in his business. In contrast, Barton had two prior assault convictions.

In an extraordinarily strongly worded dissent, Judge Wolff, joined by Judges Stith and Teitleman, expressed the view that Barton was entitled to relief on his double jeopardy claim, his challenge to the sufficiency of the evidence of guilt, and his *Chaney* claim involving his sentence of death. As Judge Wolff concluded:

In order to reach its result, the majority of the Court must not only overlook the protection of the Double Jeopardy Clause, but it also must imagine that the evidence is better than it is. The Court must imagine that “Katherine Allen” is telling the truth. The Court must also imagine that the prosecution did not attempt to suborn perjured testimony of the other jailhouse snitch, Larry Arnold, who recanted his previous trial testimony regarding Barton’s supposed admissions. The Court must also imagine that a check made out to Barton and found miles away from Ms. Kuehler’s trailer days after the crime somehow constitutes evidence of motive or an admission of guilt or an attempt to conceal evidence. The Court must imagine that witness testimony placing Barton in Ms. Kuehler’s trailer for a brief period of time at some point on the day of the murder is sufficient to implicate Barton as the murderer. The Court must imagine that

after repeatedly and violently stabbing Barton, Barton walked away from the crime with two small bloodstains on his shirt and little or no blood on his boots. The Court must imagine that this blood evidence means something more than it does.

I can imagine why the Court would affirm the conviction of Walter Barton. After all, at least 36 of the 48 jurors who have heard the evidence – tainted though it may be – have voted to convict. If this were not a criminal trial, that would be a landslide.

I cannot imagine, however, why the Court would approve the death sentence on this sorry record.

I respectfully dissent.

EIGHTH CIRCUIT DECISIONS

Marcum v. Luebbbers, ___ F.3d ___, 2007 WL 4270781 (8th Cir. 2007)

In this non-capital habeas case, the Eighth Circuit reversed the grant of habeas relief to petitioner after the district court found that trial counsel’s failure to introduce witnesses and medical records establishing that Marcum was psychotic on the day of the killing constituted ineffective assistance of counsel. There was overwhelming evidence that Marcum killed a Presbyterian minister named Kenneth Reeves by bludgeoning him with a fireplace poker. The prosecution’s theory was that Reeves had been killed because Marcum had been blackmailing him and Reeves had refused to give him money. Marcum presented an alternative theory that he was present at the victim’s house because they were lovers and denied killing Reeves. At the same time, Marcum also raised an insanity defense based upon a seizure disorder that rendered him psychotic on the date of the crime.

During state post-conviction proceedings, in support of an ineffectiveness claim, Marcum presented the testimony of Dr. William Logan who stated that Marcum’s seizure disorder would develop into organic psychosis when he did not take his anti-epilepsy drugs. Based upon an extensive review of Marcum’s medical records, Logan offered the opinion that Marcum was psychotic at the time of the killing and was legally insane. Evidence was also introduced at the state post-conviction that trial counsel had not introduced Marcum’s medical records to corroborate his seizure disorder and past psychotic episodes and did not cross-

examine the state's expert witness at trial at all. The medical records that were not introduced established that there was a pattern of numerous emergency room visits by Marcrum showing that he suffered seizures when he failed to take his medication. Many of those records showed bizarre, sometimes violent behavior in conjunction with seizures and low medication levels.

Reviewing the case under the standard of review provisions of the AEDPA, the court concluded that the state decisions finding adequate performance and a lack of prejudice under *Strickland* were both reasonable. On the issue of performance, the key factor involved trial counsel's retention of a qualified mental health professional who reviewed all of the records at issue. Counsel cannot be faulted for relying in the expert's diagnosis because he had no basis for believing that this expert had misdiagnosed his client. The court also rejected Marcrum's claim that he was prejudiced because the medical records and the lack of cross-examination would not have changed the outcome without expert testimony like Dr. Logan's. Because the trial expert was eminently qualified and conducted a thorough evaluation, trial counsel had no reason to believe he had misdiagnosed his client.

***O'Neal v. Kenny*, 501 F.3d 969 (8th Cir. 2007)**

In this Nebraska attempted assault case, the Eighth Circuit rejected petitioner's contention that, for purposes of §2244(d), a new direct appeal obtained through a successful application for state post-conviction relief required that the finality date of his conviction be set at the date the new direct appeal became final. The Eighth Circuit explained:

To determine whether a new direct appeal constitutes direct review within the meaning of AEDPA, we must examine the underlying state law. The Nebraska Supreme Court has explicitly rejected O'Neal's argument. In *State v. McCracken*, the court held that the grant of a new direct appeal constitutes a new appellate process and does not reinstate the original appellate process. ... We agree and hold that, under Nebraska law, a new direct appeal does not constitute direct review for AEDPA purposes.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

SIXTH CIRCUIT

***Girts v. Yanai*, 501 F.3d 743 (6th Cir. 2007)**

A majority of the Sixth Circuit panel granted relief on petitioner's claim that the prosecution improperly commented on his failure to testify during closing argument at his Ohio non-capital aggravated murder trial. Petitioner was accused of poisoning his wife with cyanide, and the prosecutor's argument included comments about petitioner's failure to rebut statements about possible sources of cyanide attributed to him by other witnesses, about his failure to mention to police that he had sought a small quantity of cyanide for a different application, and about petitioner being the only person capable of explaining how the cyanide reached the decedent. Because trial counsel did not object to any of these comments, the state courts reviewed them only for plain error, and the Sixth Circuit majority considered petitioner's claim procedurally defaulted. However, the majority found that petitioner overcame the bar by showing "cause and prejudice" in the form of counsel's ineffectiveness for failing to object. The majority noted that counsel's "inaction simply cannot be characterized as litigation strategy," and that "there is a strong likelihood that at least one juror would have changed his mind if the improper and prejudicial statements would not have been made, especially because the prosecutor presented weak and limited evidence at trial."

Turning to the merits of petitioner's substantive claim, the majority applied a four factor test derived from *United States v. Carter*, 236 F.3d 777 (6th Cir. 2001), and held that the prosecutor's remarks required a new trial because: (1) they "concerned central issues in the case - namely, how Petitioner's wife allegedly ingested cyanide; how Petitioner allegedly obtained the cyanide; and what Petitioner allegedly said about his wife's death," and were prejudicial and misleading, (2) the comments occurred three times and were not isolated, (3) the comments were "not a response to trial counsel's arguments," but were "deliberately placed ... before the jury," and (4) "[g]iven the facts in this case, there is a strong likelihood that the prosecutor strategically made the prejudicial statements at the end of the trial to focus the jury's attention on Petitioner's silence, and away from the limited evidence presented at trial." The majority went on to conclude that "[t]he improper statements in this case constitute flagrant prosecutorial misconduct," and petitioner was therefore

entitled to relief.

***Garner v. Mitchell*, 502 F.3d 394 (6th Cir. 2007)**

A majority of the Sixth Circuit panel granted relief on petitioner's *Miranda v. Arizona* claim in this Ohio capital case arising out of the arson felony murder of five children. Before reaching the merits, the majority noted that the state failed to contend before the district court that petitioner's claim was procedurally defaulted as a result of his failure to raise it in state court, and declined the state's request to deem the claim defaulted in this appeal. The majority reasoned that although it was permitted to consider the state's defense, the district court's expenditure of considerable resources resolving the merits, and the nature of the penalty petitioner faced, militated against relieving the state of the consequences of its waiver.

The majority next rejected the state's contention that a "modified form of AEDPA review" should apply to petitioner's claim notwithstanding his failure to present - and the state court's consequent failure to adjudicate - the claim during state court proceedings. "Without a state court decision on the claim at issue or analysis similar to the requisite constitutional analysis," the majority stated, "de novo review is required." The majority went on to find that the state court's merits rejection of petitioner's claim that trial counsel had been ineffective for failing "to inquire whether [Garner] knowingly, voluntarily, and intelligently waived his *Miranda* rights" was not sufficient to trigger application of §2254(d) to the substantive *Miranda* claim even though "the prejudice inquiry under *Strickland* is related to the merits of Garner's *Miranda* claim ..." After discussing the circumstances under which "modified AEDPA review" has been found appropriate, the majority explained why the state court's consideration of the *Strickland* claim in this case was not enough:

The analyses of the two issues is different, and the *Miranda* claim is not necessarily subsumed within the ineffective-assistance claim. The Ohio Court of Appeals certainly might have concluded that Garner did not suffer prejudice because his *Miranda* waiver was valid. The Ohio Court of Appeals also might have based its decision on a determination that Garner's waiver was invalid but that admission of his statement was harmless error. Or, the dispositive factor might have been the Ohio Court of Appeals' uncertainty regarding what an adequate investigation would have revealed. Given the one-sentence, unreasoned disposition of Garner's ineffective-assistance-of-counsel claim, it is impossible for us to determine what the Ohio Court of Appeals decided regarding the merits of Garner's underlying *Miranda* claim - or even if it made any decision at all - much less for us to give deference

to that decision. Accordingly, we review Garner's *Miranda* claim de novo.

"If we were even to attempt to apply modified AEDPA review, we would first need to analyze Garner's claims and speculate as to what the Ohio Court of Appeals most likely decided. We would then need to apply the modified AEDPA standards and analyze Garner's claims again, giving deference to what we had determined was the Ohio Court of Appeals' likely decision. Such a procedure borders on the ridiculous").

Next, the majority upheld the district court's decision to permit petitioner to supplement the record with portions of a psychologist's report and affidavit relating to petitioner's ability to execute a proper *Miranda* waiver. Rejecting the state's argument that *Holland v. Jackson*, 542 U.S. 649 (2004), prohibited record expansion, the majority noted that, unlike in *Holland*, the district court in this case made a finding that petitioner had not been at fault for the lack of development in state court, and the state had not challenged that finding. The majority further noted that to the extent the district court excluded portions of the expert's report and affidavit which were necessary to a proper understanding of the portions the court admitted, it abused its discretion.

Turning to "whether the totality of the circumstances showed that Garner knowingly and intelligently waived his *Miranda* rights before speaking to the police," the majority described petitioner's un rebutted expert evidence, including the results of four tests designed to measure a suspect's understanding of *Miranda* warnings, and then concluded as follows:

In sum, the evidence shows that Garner was nineteen years old at the time of his interrogation and had a very poor education, an IQ of 76, and other significant limitations in intellectual functioning, including limitations directly related to understanding and comprehension of his *Miranda* rights. Specifically, [petitioner's] un rebutted expert evidence indicated that Garner could not satisfactorily define the word "right" and did not understand the right to remain silent. Similar evidence has led other courts to conclude that suspects did not knowingly and intelligently waive their *Miranda* rights. ... We agree with the analysis of those courts: Garner's young age, indeterminate prior experience with the legal system, poor education, significant limitations in intellectual functioning, and the un rebutted expert evidence all tend to show that Garner's *Miranda* waiver was not made knowingly and intelligently. ... The only significant evidence

to the contrary is the fact that Garner told police at the time of his interrogation that he understood his rights and the waiver, but he has introduced un rebutted expert evidence indicating that this evidence should not be given great weight. Accordingly, applying de novo habeas review, ... we conclude that the preponderance of the evidence shows that Garner did not knowingly and intelligently waive his Miranda rights. Thus, admission of

his statement at trial was unconstitutional.

Finally, the majority noted that Miranda error like that in this case is "normally subject to harmless-error analysis." Here, however, "the state has waived any argument that admission of Garner's statement was harmless error," both by checking a box on an appellate "fact sheet" indicating that the state did not contend that any errors were harmless, and by failing to argue harmfulness "elsewhere in its brief..." "Accordingly," the majority concluded, "admission of Garner's statement was not harmless error."

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September - October 2007

NOTEWORTHY NEWS

SUPREME COURT TO HEAR
LETHAL INJECTION CHALLENGE

At the beginning of this term, the Supreme Court granted certiorari to review the constitutionality of Kentucky's lethal injection protocol in Baze v. Rees, No. 07-5439. In that case, the Kentucky Supreme Court had previously ruled that Kentucky's protocol did not violate the Eighth Amendment. The precise questions presented are detailed in the Supreme Court section below.

MISSOURI LETHAL INJECTION CASE
ALSO BEFORE THE SUPREME COURT

In Taylor v. Crawford, No. 07-303, attorneys for Michael Crawford also recently petitioned for certiorari, asking the Supreme Court to review the Eighth Circuit decision finding that Missouri's lethal injection protocol did not violate the Eighth Amendment. In the aftermath of the cert grant in Baze, attorneys for Mr. Taylor asked the Supreme Court to expedite the consideration of his petition and consolidate the case with Baze. Given the fact that the Supreme Court has thusfar declined to rule on this motion and has set an expedited briefing schedule in Baze, it appears that they are likely to hold Mr. Taylor's case pending the decision in Baze. In the aftermath of the Baze cert grant, all of the scheduled executions have thusfar either been stayed by federal or state courts, even in Texas. Thus, it appears there will be a moratorium on executions until the Baze decision is issued next year.

OPT-IN UPDATE

As reported in our last newsletter, the comment period for the proposed opt-in regulations expired at the end of September. There are now five stages of the review process left before these opt-in regulations become law. The first step involves revision by the Department of Justice. Right now, the ball is in their court. Their task is to prepare final regulations and offer explanations of why they did not adopt any suggestions from the comments provided during the comment period. There is no deadline for this process. In light of the high volume of comments, plus the leadership disarray at Justice since Alberto Gonzalez resigned, there is a significant likelihood that this process will not be completed quickly.

Once the Justice Department has completed their revision of the regulations, they will be submitted to the OMB for review. OMB review must be completed within 45 days of submission.

The third step, which usually takes only 3 or 4 days, will be for Justice to submit the rules to the Federal Register for publication. The fourth stage involves actual publication of the opt-in regulations. Thereafter, the fifth step makes these regulations effective 30 days after publication. Those in the know suggest that it is unlikely that any regulations will become effective before the spring of 2008.

IN THIS ISSUE

Noteworthy News... 1
U.S. Supreme Court... 2
Significant Decisions from the Eighth Circuit... 2
Significant Decisions from Other Circuits... 3

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

Baze v. Rees, No. 07-5439

In this case arising out of Kentucky, the Court granted certiorari on the following questions relating to the constitutionality of lethal injection:

1. Does Eighth Amendment prohibit means for carrying out method of execution that create unnecessary risk of pain and suffering as opposed to only substantial risk of wanton infliction of pain?
2. Do means for carrying out execution cause unnecessary risk of pain and suffering in violation of Eighth Amendment upon showing that readily available alternatives that pose less risk of pain and suffering could be used?
3. Does continued use of sodium thiopental, pancuronium bromide, and potassium chloride, individually or together, violate cruel and unusual punishment clause of Eighth Amendment because lethal injections can be carried out by using other chemicals that pose less risk of pain and suffering?

EIGHTH CIRCUIT DECISIONS

Niederstadt v. Nixon, ___ F.3d ___, 2007 WL 3010529 (8th Cir. 2007)

In this non-capital habeas appeal, the Eighth Circuit en banc affirmed the denial of habeas relief to petitioner, overturning a previous panel decision granting relief on Niederstadt's due process claim involving the Missouri Supreme Court's novel construction of the state forcible sodomy statute. The facts of the case involved the digital penetration of a 16-year-old victim while she was sleeping. The outcome of the case hinged on whether the forcible compulsion element of the forcible sodomy crime could be established when the sexual act was performed on a

sleeping victim and the act ceased when she awakened. The Missouri Court of Appeals originally reversed Niederstadt's conviction finding insufficient evidence to establish forcible compulsion. The Missouri Supreme Court reinstated the conviction, finding sufficient evidence of forcible compulsion based upon coercive prior beatings, threats, and sexual indecencies that petitioner had previously inflicted on the victim. Based upon these prior acts, the Missouri Supreme Court found that this evidence was sufficient to establish forcible compulsion. Niederstadt moved for rehearing before the Missouri Supreme Court, raising a due process issue under *Bouie v. City of Columbia*, arguing that the Court had unforeseeably expanded the scope of the conduct constituting forcible sodomy under state law. The Supreme Court summarily denied the motion.

As a threshold matter, the en banc majority rejected the state's argument that the due process claim was procedurally barred because it was raised for the first time on rehearing before the Missouri Supreme Court. The Court rejected this argument because the state failed to argue that the due process issue was procedurally defaulted in the Missouri Supreme Court in opposing the rehearing motion. Since the Missouri Supreme Court's summary of the denial of the rehearing motion did not state that it was resting on a procedural bar, the Court must assume that the Court denied the motion on the merits.

On the merits of the claim, the majority rejected the due process argument finding that a due process violation in *Bouie* did not occur because the Missouri Supreme Court merely applied the statute to a new fact pattern and did not overturn any prior governing law to the contrary. Reviewing the claim under the standard of review provisions of 2254(d), the Court held that Niederstadt could not establish that the Missouri decision was unreasonable. Judges Arnold, Wollman and Bye dissented, taking issue with the application of 2254(d) to the case because the Missouri Supreme Court never addressed the constitutional issue. On the merits, the dissenters found a due process violation under *Bouie* because the interpretation of the statute did not give fair warning that the aforementioned sexual conduct involving a sleeping victim constitutes the crime of forcible sodomy.

***SIGNIFICANT DECISIONS
FROM OTHER CIRCUITS***

FIRST CIRCUIT

Pike v. Guarino, 492 F.3d 61 (1st Cir. 2007)

In the course of affirming the district court's denial of relief in this Massachusetts murder case, the First Circuit rejected the state's contention that it had not waived its non-exhaustion defense. Although the state had expressly raised the defense in a motion to dismiss, it subsequently moved to withdraw that motion on the ground that, after reviewing the relevant materials, it agreed with petitioner that the relevant claims had been exhausted. The state later sought to resurrect the defense after petitioner refined a claim in a memorandum of law, but neither the district court nor the First Circuit accepted the state's contentions. "A party who chooses to waive a defense," the First Circuit explained, "surrenders that defense as to the claim asserted and any claim fairly encompassed within it." The court continued:

In other words, the waiver extends to the claim stated and any variants of the claim that are readily ascertainable from the language of the petition or complaint. The waiving party cannot play the ostrich, burying its head in the sand and struthiously ignoring that which ought to be obvious. The competence claim pursued by the petitioner was well within the compass of the language contained in ground one of the habeas petition. The fact that the Commonwealth came to regret its waiver is not a sufficient reason to allow rescission of the waiver.

Having found that the state waived its non-exhaustion defense, the First Circuit went on to reject the state's related argument that petitioner's competence claim was procedurally defaulted. The court began by noting that "The habeas respondent (here, the Commonwealth) bears the burden 'not only of asserting that a default occurred, but also of persuading the court that the factual and legal prerequisites of a default ... are present.'" While it acknowledged that "no state court has ruled on the petitioner's competence claim," the court concluded that, "in expressly waiving the nonexhaustion defense, the Commonwealth lost the concomitant right, in the procedural default context, to assert that the claim was not presented to the state courts." The court also added that the state had not met its burden of showing that a state court would refuse to

consider petitioner's claim on procedural grounds if she attempted to present it, and that such "uncertainty" over the "procedural course the state trial court would take if asked to rule on the competence claim . . . dooms the procedural default defense."

SECOND CIRCUIT

Belot v. Burge, 490 F.3d 201 (2nd Cir. 2007)

Before affirming the dismissal of petitioner's §2254 petition as untimely in this New York weapons case, the Second Circuit stated as follows about the standard of appellate review applied to challenges to a district court's denial of equitable tolling:

We believe that the appropriate standard of review depends on the aspect of the decision which is under review. A rule of law that gives the court discretion to grant an equitable exception in extraordinary circumstances seems almost inherently to invite the court's discretion in applying these standards. The balancing of factors involved in determining what result is equitable and the appraisal of whether the circumstances are sufficiently extraordinary seem to contemplate that in the same set of facts, different results could be acceptable. In such circumstances, courts often say that appellate review is for "abuse of discretion." But that label in a way obscures more than it reveals. The operative review standard in the end will depend on what aspect of the lower court's decision is challenged. If a district court denies equitable tolling on the belief that the decision was compelled by law, that the governing legal standards would not permit equitable tolling in the circumstances - that aspect of the decision should be reviewed de novo. If the decision to deny tolling was premised on an incorrect or inaccurate view of what the law requires, the decision should not stand. Courts generally in such circumstances state that application of an incorrect standard of law is an "abuse of discretion." Considering a second aspect, if the decision to deny tolling was premised on a factual finding, the factual finding should be reviewed for clear error. Finally, if the court has understood the governing law correctly, and has based its decision on findings of fact which were supported by the evidence, but the challenge is addressed to whether the court's decision is one of those within the range of possible permissible decisions, then appellate review will be, not only in name, but also in

operation, for abuse of discretion. The reviewing court will recognize that in theory the lower court has numerous options open to it and its decision must be sustained unless the particular facts and circumstances are such as to make the particular decision an abuse of discretion. These three distinct potential aspects of a decision and the concomitant types of review are collected under the label "abuse of discretion."

SIXTH CIRCUIT

Hartman v. Bagley, 492 F.3d 347 (6th Cir. 2007)

Before affirming the denial of relief in this Ohio capital case, the Sixth Circuit rejected the state courts' determinations that petitioner's ineffective assistance of counsel claims were procedurally barred as *res judicata*, and that petitioner lacked cause for having failed to pursue a timely appeal of the denial of state post-conviction relief. The lower state post-conviction court found the claims barred on the ground that they did not rely on evidence outside the trial record and therefore could have been raised on direct appeal. The Sixth Circuit rejected the first of these bases because its own review of the record indicated that petitioner's claim "was based primarily on a forensic psychology report that was, in fact, outside the record," and state law provided that claims based on non-record evidence were not subject to the *res judicata* bar relied upon by the state court. As to petitioner's untimely appeal of the denial of state post-conviction relief, the Sixth Circuit found that petitioner had established cause for his failure to timely file by submitting uncontested evidence that neither he nor his counsel had been provided timely notice of the lower court's order denying relief. The court nevertheless denied relief on petitioner's claim because he had not established prejudice.

Harbison v. Little, ___ F.Supp.2d ___, 2007 WL 2821230 (M.D. Tenn. 2007)

The United States District Court for the Middle District of Tennessee issued a ruling finding that the Tennessee lethal injection protocol violates the Eighth Amendment because it imposes an inherent risk of "the unnecessary and wanton infliction of pain." The court reached this conclusion by finding that if the dose of the first drug is insufficient, the prisoner may awaken prior to the administration of the third drug and suffer excruciating pain. The court also found that prison

officials knowingly disregarded this excessive risk of pain by rejecting recommendations made after an extensive study by the Tennessee protocol committee.

SEVENTH CIRCUIT

Stevens v. McBride, 489 F.3d 883 (7th Cir. 2007)

The Seventh Circuit granted sentencing phase relief on petitioner's ineffective assistance of counsel claim in this Indiana capital case involving the rape and murder of a young boy. After learning that their client had himself been "physically, mentally, and emotionally abused as a child, and . . . raped by a stranger when he was 10 years old," and had been diagnosed with "major depression and possible schizophrenia," defense counsel understood that "a mental health examination would be an important component of trial preparation." Counsel retained psychologist Lawrence Lennon. Although counsel instructed Lennon to evaluate petitioner but not to write a report, Lennon wrote and delivered a report containing "numerous statements that were extremely detrimental to Stevens's case" anyway. Counsel soon learned of certain unorthodox beliefs held by Dr. Lennon - including his subscription to the "myth of mental illness" theory, and his use of "trust and bonding therapy" involving placing teenagers on his lap and putting bottles in their mouths - and "concluded that he was a 'quack.'" Trial counsel did not replace Lennon or seek other expert advice. Instead counsel turned his report over to the prosecution and then called him to testify twice, once before the jury and a second time before the sentencing judge. Among other damaging statements, Lennon testified that petitioner would be a danger in the future, and revealed for the first time on the witness stand that petitioner had told him that he had masturbated over the dead child's corpse.

Other post-conviction testimony from mental health experts implicated three statutory mitigating circumstances - extreme emotional disturbance, lack of capacity to appreciate wrongfulness, and a catch-all factor - while the testimony presented by trial counsel, which featured Lennon as the only mental health expert, tended to address only the third factor. Rejecting the state's contention that trial counsel's failure to move beyond Lennon and develop useful mental health evidence for trial resulted from a "reasonable strategic decision," the court stated that:

The lawyers' decision to forego presenting this kind of mitigation evidence was made without the kind of investigation into Stevens's mental health that *Strickland* calls

for, . . . it is uncontested that Stevens's lawyers knew nothing about the content of Dr. Lennon's planned testimony. The lawyers confessed at the post-conviction hearing that they were utterly in the dark about what Dr. Lennon would say when he took the stand. They frankly admitted that during trial preparations, Dr. Lennon would only repeat, "I can handle it. Don't worry about it." This is a complete failure of the duty to investigate with no professional justification.

Turning to prejudice, the Seventh Circuit went on to find "reasonable probability . . . that the result would have been different if the jury had heard mainstream expert psychological testimony . . ." The court explained that such testimony "would have strengthened the general mitigation evidence . . . by focusing the jury on the concrete results of years of abuse on Stevens's psyche," and "would have provided his lawyers a basis for rebutting the aggravating factors highlighted by the State." The court went on to conclude that trial counsel had been ineffective, and the "Indiana Supreme Court's ruling to the contrary amounted to an unreasonable application of *Strickland*."

NINTH CIRCUIT

***Lambright v. Schriro*, 485 F.3d 512 (9th Cir. 2007) (per curiam)**

The Ninth Circuit granted sentencing phase relief on petitioner's ineffective assistance of counsel claim in this pre-AEDPA Arizona capital case. Before beginning its own discussion of the evidence, the Ninth circuit rejected the district court's analysis of petitioner's claim because it applied a requirement "that mitigating evidence have some nexus or causal connection to the crime" which was "clearly inapplicable" under circuit precedent and, more recently, *Tennard v. Dretke*, 542 U.S. 274 (2004).

As to trial counsel's performance, the court began by explaining that although counsel was aware of information indicating that petitioner's early years were plagued by severe physical and emotional abuse, forced ingestion of drugs, instability and victimization, and extreme poverty, that petitioner has a history of drug use and depression, and that he suffered from a personality disorder and possibly PTSD, counsel

investigated none of it. Instead, counsel "spent only five and a half hours obtaining evidence and preparing for the penalty phase," and the "sum total of the mitigating evidence . . . offered at sentencing required less than three pages of a double-spaced transcript and relates only to Lambright's behavior in jail." Counsel's sentencing phase closing argument was likewise brief. Counsel "did not ask for leniency or mercy; instead, he merely requested, without any elucidation, that the court impose a sentence of life in prison." "Accordingly," the Ninth Circuit found, counsel's "presentation at the penalty phase of Lambright's trial, like his mitigation investigation, fell far below the level of representation to which Lambright was entitled under the Sixth Amendment."

With regard to prejudice, had counsel effectively presented the information he would have uncovered, and had he then made the appropriate arguments to the sentencing judge, there is a reasonable probability that the result of the sentencing proceeding would have been different. In support of this conclusion, the court emphasized that Arizona sentencing law at the time of petitioner's trial mandated a death sentence in the absence of mitigating evidence and noted that "the sentencing judge's own statements make clear that, given [counsel]'s failure to present any significant mitigating evidence, the judge felt legally compelled to impose the death penalty in this case," despite the existence of only one aggravating factor.

ELEVENTH CIRCUIT

***Jennings v. McDonough*, 490 F.3d 1230 (11th Cir. 2007)**

In the course of affirming the denial of relief in this Florida capital case, the Eleventh Circuit commented as follows with regard to petitioner's reliance on *Kyles v. Whitley* in support of his Brady v. Maryland claim: "Although decided after the Florida Supreme Court's decision in [petitioner's case], *Kyles* did not announce a new rule of law and therefore informs our review of the state court's *Brady* analysis." In so noting, the court did not mention *Gilliam v. Secretary for the Department of Corrections*, 480 F.3d 1027 (11th Cir. 2007) (per curiam), in which another Eleventh Circuit panel indicated it was "troubled" by the district court's reliance on *Rompilla v. Beard*, 545 U.S. 374 (2005), because *Rompilla* had been decided after the state court had resolved the petitioner's case.

Later in this opinion, the Eleventh Circuit joined the Fourth, Fifth, Sixth, Eighth and Tenth Circuits in

holding that federal courts are permitted to conduct harmless error review of death sentences based on invalid aggravating factors even the state appellate

court did not perform a harmless error analysis of its own.

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The PUBLIC INTEREST LITIGATION CLINIC MISSOURI CAPITAL CASE UPDATE[®]

July - August 2007

NOTEWORTHY NEWS

OPT-IN UPDATE

As noted in our prior newsletter, the Justice Department issued its opt-in regulations in June, setting forth procedures for states to follow to seek to implement the provisions of the Streamlined Procedures Act (SPA). The latest development is that the comment period has been extended from the previous deadline of August 6, 2007 until September 24, 2007. Thereafter, the regulations will be reviewed by the OMB. In light of this development, it is unlikely that these regulations will be enacted prior to the end of the year.

PREPARE FOR A BLOODY 2008

Three weeks ago, the Eighth Circuit issued its mandate in the Michael Taylor lethal injection action, clearing the way for the Missouri Supreme Court to set execution dates for several men who had previously exhausted their appeals. As of this date, no execution dates have been set and we are hopeful that the Missouri Supreme Court will decline to do so until Taylor's cert petition is ruled upon. Taylor's lawyers inexplicably just filed his cert petition nearly 60 days before it was due. Assuming cert is denied in October, it is not unlikely that there will be between 10 and 20 executions in Missouri during the 2008 calendar year. With this carnage taking place against the backdrop of the hotly contested governor's election between Matt Blunt and Jay Nixon, each of whom will undoubtedly be trying to claim credit for this bloodbath, the campaign season promises to be an interesting event for political junkies and a revolting spectacle to those who oppose state-sponsored killing. Are there any good third

party candidates out there?

MISSOURI SUPREME COURT UPHOLDS PENALTY PHASE RELIEF FOR TRAVIS GLASS

In a 4-3 decision, the Missouri Supreme Court upheld the 29.15 motion court decision granting penalty phase relief to death row inmate Travis Glass on a claim of penalty phase ineffectiveness. However, there are ominous undercurrents regarding the composition of the majority and minority justices. The deciding vote was issued by outgoing Justice Ronnie White and the dissenting opinion was issued by the most recent appointee to the court, Justice Mary Russell. In light of this headcount, Justice White's replacement may hold the balance of power, like Justice Kennedy on the U.S. Supreme Court, in death penalty cases.

POLITICAL FIRESTORM BREWING OVER APPOINTMENT OF NEW SUPREME COURT JUSTICE

More than a month ago, the Judicial Nominating Commission gave Governor Blunt the names of Court of Appeals Judges Ronald Holliger, Patricia Breckenridge, and Nannette Baker as candidates to succeed outgoing Supreme Court Justice Ronnie White. Because the governor was not happy with the fact that none of these three candidates were right-wing ideologues, he and his allies began an attack on the Missouri non-partisan judicial selection process and intend to utilize this issue in his 2008 re-

IN THIS ISSUE

<i>Noteworthy News</i>	1
<i>U.S. Supreme Court</i>	2
<i>Missouri Supreme Court</i>	4
<i>Significant Decisions from the Eighth Circuit</i>	4
<i>Significant Decisions from Other Circuits</i>	7
<i>Significant Decisions from Other States</i>	8

election campaign. Many political commentators believe that Governor Blunt will refuse to appoint any of the three candidates, passing the buck to the commission to appoint Judge White's successor. Republican strategists obviously feel that this tactic will fire up the conservative base for the 2008 election around the rallying cry of "activist judges." In light of widespread opposition to the repeal of the non-partisan plan by many prominent former Republican judges and the Missouri Bar, we are confident that this tactic will backfire.

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

Snyder v. Louisiana, 127 S.Ct. 3004 (2007)

On June 25, 2007, the Court granted certiorari in this capital direct appeal case, where the appellant's petition set forth the following questions:

1. Did the majority below ignore the plain import of *Miller-El* by failing to consider highly probative evidence of discriminatory intent, including the prosecutor's repeated comparisons of this case to the O.J. Simpson case, the prosecutor's use of peremptory challenges to purge all African Americans from the jury, the prosecutor's disparate questioning of white and black prospective jurors, and documented evidence of a pattern of practice by the prosecutor's office to dilute minority presence in petit juries?
2. Did the majority err when, in order to shore up its holding that Mr. Snyder had failed to prove discriminatory intent, it imported into a direct appeal case the standard of review this Court applied in *Rice v. Collins*, an AEDPA habeas case?
3. Did the majority err in refusing to consider the prosecutor's first two suspicious strikes on the ground that defense counsel's failure to object could not constitute ineffective assistance of counsel because Batson error does not render the trial unfair or the verdict suspect - i.e., that failure to raise a Batson objection can never result in prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) - a holding directly conflicting with decisions from inter alia the Third Circuit Court of Appeals and the Alabama and Mississippi Supreme Courts?

OPINIONS

Panetti v. Quarterman, 127 S.Ct. 2842 (2007).

On a 5-4 vote, the Court (Kennedy, J., writing) reversed the Fifth Circuit and held that Panetti's habeas petition presenting his first *Ford v. Wainwright* claim of incompetency to be executed did not constitute a "second or successive" application under the AEDPA. It then held that: Panetti had made a "substantial showing" of *Ford* incompetency; the state court failed to provide constitutionally-mandated procedures to which Panetti was entitled; and the Fifth Circuit panel used an improperly restrictive test when it considered Panetti's claim of incompetency.

Relevant facts from this case include the following:

Panetti's dressing in camouflage to kill his estranged wife's parents;

a court-ordered psychiatric evaluation showing that Panetti suffered from, was hospitalized for, and was prescribed strong anti-psychotic medicine for his fragmented personality, delusions, and hallucinations; and

a psychotic episode witnessed by his wife six years before the killing of her parents in which Panetti became convinced that the devil possessed his home and buried valuable items next to it.

The trial court, however, found Panetti competent to both stand trial and waive counsel. Standby counsel described Panetti as obviously mentally incompetent: for example, he had stopped taking his anti-psychotic medication before trial, and engaged in bizarre, scary, and trance-like behavior. After Panetti was sentenced to death that the trial court found him incompetent to waive state habeas counsel.

After his direct appeal, state habeas, and federal habeas proceedings were completed, the state set an execution date. In response, Panetti filed a motion in state court claiming, for the first time, that he was incompetent to be executed. The motion was denied, and Panetti then filed a habeas petition and a motion for a stay of execution in federal district court. The federal court granted the stay so that the state courts could consider evidence of Panetti's current mental state.

The state court asked the parties to submit names of potential mental health experts, as well as any

proposed procedures to resolve the legal issue of incompetency, but then ignored its own requests and appointed its own experts without the parties' input. The court's experts concluded that Panetti knew of his impending execution and its result (his death), and was able to know why the reason for the execution. Federal habeas counsel objected to the experts' conclusions and renewed their motions for appointment of counsel and funds for a defense expert. In response, the state court issued its ruling against Panetti, which found that he had failed to show, by a preponderance of the evidence, incompetence to be executed.

Panetti returned to federal court, which again stayed his execution, and, in addition, appointed counsel, granted funds for a defense expert, and held an evidentiary hearing (at which both parties presented expert testimony). But it denied relief on the incompetency claim, and this denial was affirmed by the Fifth Circuit.

The Supreme Court first rejected the warden's argument that Panetti's federal habeas petition was a "second or successive" petition required to meet 24 U.S.C. §2244(b)(2)'s prerequisites for filing. The Court held that:

The results [that argument] would produce, however, show its flaws. As in *Martinez-Villareal*, [523 U.S. 637 (2000)], if the State's "interpretation of 'second or successive' were correct, the implications for habeas practice would be far reaching and seemingly perverse." 523 U.S., at 644, 118 S.Ct. 1618. A prisoner would be faced with two options: forgo the opportunity to raise a Ford claim in federal court; or raise the claim in a first federal habeas application (which generally must be filed within one year of the relevant state-court ruling), even though it is premature. The dilemma would apply not only to prisoners with mental conditions indicative of incompetency but also to those with no early sign of mental illness. All prisoners are at risk of deteriorations in their mental state. As a result, conscientious defense attorneys would be obliged to file unripe (and, in many cases, meritless) Ford claims in each and every § 2254 application. This counterintuitive approach would add to the burden imposed on courts, applicants, and the States, with no clear advantage to any.

The Court cited its decisions in *Slack v. McDaniel* 529 U.S. 473 (2000), and *Martinez-Villareal*

v. Stewart, 523 U.S. 637 (1998), noted that in those cases it had specifically "declined to interpret 'second or successive' as referring to all § 2254 applications filed second or successively in time, even when the later filings address a state-court judgment already challenged in a prior § 2254 application," and concluded that Congress had not intended § 2244 to apply to a habeas petition raising a Ford claim at the time the claim was ripe.

The Court then found that in Panetti's case, the state court's failure to provide Ford's protections -- a fundamentally fair hearing and opportunities to be heard, to submit evidence, and to argue -- constituted an unreasonable application of Ford, which was clearly established Supreme Court law. Because Panetti had "made a substantial showing of incompetency" through his "Renewed Motion To Determine Competency," which included expert opinions as well as references to extensive evidence of his mental dysfunction, he was entitled to "among other things, an adequate means by which to submit expert psychiatric evidence in response to the evidence that had been solicited by the state court." In contrast, the state court's factfinding procedures were "not adequate for reaching reasonably correct results" or, at a minimum, resulted in a process that appeared to be "seriously inadequate for the ascertainment of the truth," *Ford v. Wainwright*, 477 U.S. 399, 423-424 (1986).

The Court held that Panetti's delusions could be said to render him incompetent, and that the Fifth Circuit's analysis of this subject was "too restrictive to afford a prisoner the protections granted by the Eighth Amendment," *Panetti, supra*, at 2860, as well as incorrect in treating a delusional belief system as irrelevant.

The beginning of doubt about competence in a case like petitioner's is not a misanthropic personality or an amoral character. It is a psychotic disorder.

Petitioner's submission is that he suffers from a severe, documented mental illness that is the source of gross delusions preventing him from comprehending the meaning and purpose of the punishment to which he has been sentenced. This argument, we hold, should have been considered.

... Gross delusions stemming from a severe mental disorder may put an awareness of a link between a crime and its punishment in a context so far removed from reality that the

punishment can serve no proper purpose. It is therefore error to derive from *Ford*, and the substantive standard for incompetency its opinions broadly identify, a strict test for competency that treats delusional beliefs as irrelevant once the prisoner is aware the State has identified the link between his crime and the punishment to be inflicted.

Finally, the Court remanded the case to the district court for further inquiry into Panetti's mental illness.

MISSOURI SUPREME COURT RECENT DECISIONS

***Glass v. State*, 227 S.W.3d 463 (Mo. banc 2007)**

The Missouri Supreme Court (Teittelman, J., writing), affirmed the 29.15 motion court's grant of relief to Glass on the basis of his trial counsel's ineffectiveness at the death penalty phase of his trial.

While Glass' trial counsel presented family members, friends, and work colleagues at the penalty phase, they failed to investigate and present testimony from the medical doctor who treated him for bacterial meningitis when he was 2; Glass' former teachers; Glass' former probation officers; and experts, including a neuropsychologist, a speech and language pathologist, and a toxicologist.

Glass' treating physician would have testified that the long-term effects of bacterial meningitis included impaired intellectual functioning, and his teachers would have testified about that functioning as well as their specific experience with Glass' learning difficulties. Glass' former probation officers would have testified about his good behavior while on probation, which would have reduced the impact of his prior conviction. The neuropsychologist would have testified about Glass' neuropsychological deficits that impair his ability to comprehend information, reason abstractly, and solve problems, as well as the fact that the impairment of his temporal brain lobe caused him to have difficulties with learning, memory, and impulse control. The pathologist would have testified that Glass' aptitude functioning is well-below his age level in almost all areas, including concept formation, written language, and reasoning skills. The toxicologist would

have testified that Glass' drinking alcohol had affected him to the extent that at the time of the crime, his ability to appreciate the criminality of his conduct and conform to the requirements of the law were substantially impaired, and that he suffered from an extreme mental and emotional disturbance.

The Missouri Supreme Court found that each of counsel's failures was prejudicial. In the part of its decision discussing Glass' former probation officers, it held that the appellate standard of "clear error" review applies "where, as in this case, the motion court determines after *an evidentiary hearing*, that the movant has made a valid claim of ineffective assistance." (emphasis added).

EIGHTH CIRCUIT DECISIONS

***Nooner v. Norris*, 2007 WL 2403740 (8th Cir. Aug. 24, 2007)**

After the Eighth Circuit panel denied relief on Nooner's first habeas petition in 2005, he filed a motion in that court to allow him access to mental health experts for the purpose of an evaluation; the motion was denied for lack of jurisdiction but "without prejudice to [Nooner's] right to file a petition for habeas corpus in the district court." Then, during the pendency of his petition for certiorari relating to his first habeas petition, Nooner filed a subsequent habeas petition in the district court, which sought access to mental health experts and an evaluation, as well as a motion for a stay of execution (despite the non-existence of an execution warrant). The district court dismissed this subsequent petition on the basis that it was a "second or successive" petition governed by 28 U.S.C. § 2244(b) and lacked the Circuit's authorization necessary for filing. Nooner appealed and argued that the petition did not fall under § 2244(b) because it did not challenge his conviction or sentence, but rather the denial of access to experts in order to develop a mental retardation claim under *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Eighth Circuit reversed the district court's dismissal and remanded the case in order for the district court to address whether the denial of access to experts violated Nooner's constitutional rights. It analogized Nooner's situation to that of a petitioner claiming incompetency to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and held that "[f]or the limited purpose of the statutory bar on second or successive applications found in § 2244(b)(2)" it could not think of any statutory reason not to extend Supreme

Court law holding § 2244 inapplicable to Ford claims to Nooner:

In both [*Stewart v.*] *Martinez-Villareal* [, 523 U.S. 637 (1998)] and *Panetti v. Quarterman*, 127 S.Ct. 2842 (2007)], the Supreme Court held the statutory bar on second or successive applications does not apply to Ford-based incompetency claims filed *after the state has obtained an execution warrant*. *Panetti*, 127 S.Ct. at 2849, 2853; *Martinez-Villareal*, 523 U.S. at 640, 643-44. For the limited purpose of the statutory bar on second or successive applications found in § 2244(b)(2), we cannot think of any statutory reason why this holding cannot be extended to Ford-based incompetency and Atkins-based mental retardation claims filed *before the state has obtained an execution warrant*.

The court noted, but did not discuss, the fact that after it held oral argument, the State of Arkansas set an execution date for Nooner. The court dismissed his motion for a stay, stating that he could file such motion in the district court.

***Crawford v. State of Minnesota*, 2007 WL 2350152 (8th Cir. Aug. 20, 2007)**

The Eighth Circuit affirmed the denial of habeas relief on the basis that Crawford's Sixth Amendment public trial claim was defaulted. When the trial court in his case partially closed the courtroom during the testimony of the victim, who was a minor, pursuant to an applicable state statute, Crawford failed to object. On direct appeal, the state appellate court found that this failure constituted a waiver of this issue. The Eighth Circuit held that Minnesota state court decisions regularly followed their waiver rule, and, "reflect[ed] a basic consistency" in applying it to public trial claims under the state statute. Additionally, it held that Crawford had actually agreed to a partial closure of the courtroom.

***Middleton v. Roper*, 2007 WL 2331892 (8th Cir. Aug. 17, 2007)**

The Eighth Circuit affirmed the denial of habeas relief to Middleton, a death penalty habeas petitioner. It held that the state direct appeal court decision's affirming the trial court's (1) denials of counsel's requests for continuances as not violating Middleton's rights to a fair trial and effective assistance of counsel; (2) use of Missouri's Approved Instructions

for the penalty phase, which are consistent with Eighth Amendment requirements; and (3) admission of evidence depicting the victims in an uncharged case, was a decision that reasonably applied Supreme Court law. It also held that the state post-conviction court's affirmance of the 29.15 court's denial of Middleton's claims of trial counsel's ineffectiveness, directed at their failures to object to the standard penalty phase instructions and to present scientific studies showing that jurors do not understand such instructions (and are thus likelier to impose death), reasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984). Finally, the Circuit held that the state court decision rejecting Middleton's claim that his death sentence was disproportionate to punishments imposed in similar cases was a reasonable application of Supreme Court law.

***Bell-Bey v. Roper*, 2007 WL 2376597 (8th Cir. Aug. 17, 2007)**

The Eighth Circuit affirmed the denial of habeas relief to Bell-Bey, who raised claims of improper strikes of prospective jurors under *Batson v. Kentucky*, 476 U.S. 79 (1986); improper admission of hearsay evidence; and improper exclusion of business records.

Regarding *Batson*, the state struck five of seven African-American prospective jurors, including the only African-American male prospective juror, who had said, in response to voir dire questioning, that there would be nothing about a police officer that would tend to make him believe the officer more than any other person. When Bell-Bey challenged the state's strike of this prospective juror, the prosecutor explained it on the basis that the juror had "stated extremely firmly that he absolutely believed police officers can lie," and also referred to his body language. The trial court found this explanation to be race-neutral and upheld the strike. As to Bell-Bey's specific argument that the trial court decision was contrary to Supreme Court law because it failed to determine whether the explanation was a pretext for purposeful race discrimination (the third element of the *Batson* test), the Eighth Circuit held that the trial court found the explanation credible and the appellate court further found that Bell-Bey failed to show pretext and racial motivation.

As to his argument that the trial court decision unreasonably applied Supreme Court law, the Circuit held that the prosecutor's first asserted reason for the strike was not supported by the record, but that his second reason was legitimate and race-neutral:

"[a]ssuming for the purpose of argument that the state attorney's first reason gives rise to some inference of discrimination, this inferred discrimination is nevertheless insufficient because the state attorney also provided a nondiscriminatory reason for the use of the peremptory strike." It then rejected Bell-Bey's complaint that the trial court failed to develop the factual basis of the juror's body language and failed to permit him to challenge the assertion of body language explanation because "[t]he burden...rested on Bell-Bey to rebut and develop a record demonstrating the state attorney's proffered nondiscriminatory rationale for the peremptory strike was pretextual."

Regarding hearsay, the Circuit rejected both of Bell-Bey's arguments, holding that his claim that the post-conviction appellate court applied an erroneous standard of review was not a claim of federal constitutional magnitude, and that his claim of a Confrontation Clause violation was both unexhausted and defaulted. Finally, reading the trial court's exclusion of business records as well as testimony about these records, the Circuit held that the exclusion of what was marginally relevant evidence was a reasonable application of federal law that did not prejudice Bell-Bey's due process or compulsory process rights.

***Mark v. Ault*, 2007 WL 2323944 (8th Cir. Aug. 16, 2007)**

In this case the Eighth Circuit reversed the grant of partial habeas relief and affirmed the denial of the remaining relief requested. It reversed the district court's grant of relief under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, which had been awarded on the basis of the state appellate court's failure to collectively analyze the evidence suppressed by the state in order to determine its materiality. The Circuit held that it was of no consequence that the state court failed to cite *Kyles v. Whitley*, 514 U.S. 419 (1995), or *Kyles'* rule that a court must collectively analyze evidence that had been suppressed, because an actual collective analysis "d[id] not require a different outcome in this case." It also held that while Mark failed to present an "unreasonable application" of Supreme Court law argument in his brief or argument, "even assuming Mark had properly presented this claim, in light of the evidence...and our conclusion that the allegedly suppressed evidence, when considered collectively, does not require the conclusion that Mark's due process rights were violated, we would not find the decision of the Iowa Court of Appeals to be 'objectively unreasonable.'"

The Circuit additionally affirmed the district court's denial of Mark's Habeas Rule 7 motion to expand the record with the DNA-profile results from four cigarette butts found at the crime scene. The warden argued against the motion on the basis that Mark asserted an unexhausted claim based on newly discovered evidence, and the district court reversed its initial grant of the motion for the reason that it did not want "the appellate process ... complicated by the reviewing court concluding that there is an exhaustion problem." On appeal, the Circuit "assume[d] without deciding that the new evidence serves only to bolster Mark's claim of constitutional error under *Brady* and does not present a new, unexhausted claim." It held, however, that Mark could not expand the record because he failed to meet § 2254(e)(2)'s requirement that he show, by clear and convincing evidence, that but for constitutional error, no reasonable factfinder would have found him guilty. The Circuit's support for this holding stated that, with respect to two of the cigarette butts, "the testing yielded no results and therefore establishes nothing," that cross-examination of the state's expert at trial revealed that one of the other two cigarettes had been smoked by a police officer; and that the new test results eliminating Mark as the smoker of the fourth cigarette were

neutralized by Mark establishing on cross-examination [at trial] that his blood type [which was identified on direct examination as that of the smoker] was very common among the general population and the expert's admission that blood-type testing is subject to error. Furthermore, the jury also heard testimony that of the many people on the investigation team who were present at the crime scene, several of them were smokers and smoked while at the crime scene. Finally, the fact that the State did not once mention the cigarette butt evidence to the jury in its closing and rebuttal arguments serves to illustrate the minimal impact of this evidence on the outcome of the trial.

The Circuit concluded that

In sum, the majority of the new DNA evidence with which Mark seeks to expand the record only confirms what the jury could have reasonably concluded from the evidence presented to them at trial. With respect to the results from the...sample indicating that Mark did not smoke that particular cigarette, we

conclude that its probative value is slight when compared to the overall evidence implicating Mark. As such, the new DNA evidence Mark presents is not clear and convincing evidence in the face of which no reasonable factfinder would have found Mark guilty.

***Franklin v. Luebbers*, 2007 WL 2090046 (8th Cir. July 24, 2007)**

The Eighth Circuit reversed the district court's grant of habeas relief to this death penalty habeas petitioner, which had been issued on the grounds that Franklin's waiver of trial counsel was not knowing, voluntary, and intelligent, and that the trial court erred in failing to give a penalty phase jury instruction. The Circuit held that Franklin's written waivers of his direct appeal were voluntary and caused all of his habeas claims to be defaulted, and thus the district court had lacked jurisdiction to grant relief.

***Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), reh'g denied 2007 WL 2380357 (Aug. 20, 2007)**

The Eighth Circuit remanded this case to the district court for an evidentiary hearing on what it held was Simpson's previously unavailable federal constitutional claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). It reversed the district court's finding that Simpson's *Atkins* claim was defaulted due to his failure to present mental retardation as a defense to the death penalty, as permitted by Arkansas state law, in any of his state court proceedings, as well as its requirement that Simpson meet § 2254(e) before being granted an evidentiary hearing. It held that Simpson's *Atkins* claim was a "previously unavailable federal claim" that was "separate and distinct" from any state law claim. "Since *Atkins* created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded, Mr. Simpson can hardly be said to have lacked diligence in developing the factual basis of that claim in state court." It then remanded the case to the district court, noting that Arkansas Supreme Court law is clear in its refusal to recall mandates affirming death sentences in order to consider a post-*Atkins* mental retardation claim where the defendant failed to present such retardation as a defense to the death penalty under state law. The Circuit held that "Simpson has alleged that he is mentally retarded as *Atkins* defines that condition, which would entitle him to relief, and that matter remains in dispute. Since his inability to present his *Atkins* claim in state court precluded him from receiving 'a full and fair evidentiary hearing' there, he satisfies the conditions outlined in *Townsend v. Sain*,

372 U.S. 293, 312 (1963), *overruled on other grounds, Keeney v. Tamayo-Reyes*, 504 U.S. 1, 5-6 (1992)]."

The Circuit upheld the district court's denial of habeas relief on other claims of instructional error and effective assistance of post-conviction counsel, as well as procedural default issues.

***Greer v. Minnesota*, 493 F.3d 952 (2007)**

The Eighth Circuit affirmed the denial of habeas relief to this petitioner, holding that the state court's denials (1) of his judicial bias claim on state procedural grounds constituted a procedural default; (2) of his Confrontation Clause claim under the appropriate harmless error standard was neither contrary to nor an unreasonable application of clearly established Supreme Court law; and (3) of his claim that the trial court erroneously limited his trial testimony by excluding testimony regarding why he had been at the scene, was neither contrary to nor an unreasonable application of clearly established Supreme Court law.

***SIGNIFICANT DECISIONS
FROM OTHER CIRCUITS***

SIXTH CIRCUIT

***Halyim v. Mitchell*, 492 F.3d 680 (6th Cir. 2007)**

The Sixth Circuit reversed the denial of relief to this death penalty habeas petitioner because his trial counsel were ineffective at the penalty phase for failing to present significant available mitigating evidence to the three-judge panel (which the petitioner had elected, under state law, over a jury). Counsel presented three witnesses and Halyim's unsworn statement apologizing for killing the victims: the witnesses were Halyim's boss, who testified to his good work performance; Halyim's grandmother, who testified to his disturbed state of mind after his parents died (from a heroin overdose and from asthma), as well as the facts that Halyim's brother was shot to death and that Halyim was a good father; and a psychologist, who had met with Halyim for an hour and a half, and testified that he did not have a mental disease or defect (despite having an anti-social personality disorder, an adjustment disorder with depressed moods, and poor judgment) and was malingering. But counsel failed to investigate available and significant mitigating evidence.

For example, at post-conviction, Halyim presented a psychological and neuropsychological evaluation by Dr. Smalldon, as well as an affidavit of

mitigation specialist Crates. Smalldon's report was critical of the trial psychologist and the evidence he relied upon; it pointed out that an old competency report, for example, showed a twenty-five point difference between Halyim's performance IQ and verbal IQ. Such a difference, Smalldon said, is a serious warning sign that may indicate an underlying learning disability or functional brain impairment. Despite this point difference and the fact that Halyim had shot himself in the left temple during a suicide attempt, he had not been examined previously for functional brain impairment. Smalldon concluded that Halyim had mild to moderate functional brain impairment, longstanding depression, a history of alcohol and substance dependence, and a personality disorder with paranoid and antisocial features.

Crates' affidavit set forth that Halyim grew up in a violent environment, which included being severely physically abused and beaten by his father. Crates also stated that trial counsel's ordering of a presentence investigation report in this case violated the standard practice to refrain from requesting such a report, which would lack a defendant's psychosocial and family history.

The Sixth Circuit noted that the state courts had not addressed the merits of Halyim's ineffectiveness claim, and so it reviewed this claim outside of § 2254(d)'s restrictions. It held that trial counsel had failed to explore "obvious avenues of investigation that would have produced valuable mitigating evidence." For example, counsel failed to interview Halyim's siblings; failed to investigate evidence of which they knew, including Halyim's father's death from a drug overdose; and failed to investigate other evidence, such as the effect on Halyim of his parents and oldest brother dying in short succession to one another. In fact, when brief evidence of Halyim's troubled childhood did come before the three-judge panel, the Circuit noted that counsel ended up presenting evidence inconsistent with the abuse of Halyim, such as his statement that his parents were beautiful parents. "Perhaps most importantly," the Circuit said, "a more thorough investigation would have led to some evidence that [Halyim] had a mental defect." In its decision, the Circuit cited and relied upon the 2003 ABA guidelines, which it previously, in another federal habeas death penalty case, found to have codified "long-standing common-sense principles of representation understood by diligent, competent counsel in death penalty cases." And, finally, it rejected the possibility that trial counsel's failures were the products of strategic choices.

It then held that counsel's ineffectiveness was prejudicial, and, in one instance, reviewed questions posed to the trial psychologist by the three judge panel, probing the existence of a mental disease or defect: in doing so, it found that "had [Halyim's] expert...responded that [he] suffered from functional brain impairment, stemming from a gunshot wound to the left temple, which could be considered a mental disease or defect, there is a reasonable probability that the three-judge panel would have changed [its] assessment of the mitigation evidence."

SIGNIFICANT DECISIONS FROM OTHER STATES

NEW JERSEY

***State v. Jimenez*, 924 A.2d 513 (N.J. Sup. Ct. 2007) (per curiam)**

In New Jersey, the *Atkins* phase of a death penalty case is tried to the jury, in between the trial phase and the penalty phase. In *Jimenez*, the New Jersey Supreme Court held, for the first time, that a death penalty defendant need only convince one juror, rather than twelve, by a preponderance of the evidence, that he is mentally retarded and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). The court likened this *Atkins* finding to a *Mills v. Maryland*, 486 U.S. 367 (1988), finding, where a defendant need only convince one juror of the existence of a mitigating factor. The court then amended New Jersey's *Atkins* procedure by folding the mental retardation decision into the penalty phase proceedings. "In sum, a defendant may have as many as three opportunities to present a mental retardation issue: at pretrial before the trial court; before a jury during the guilt-phase trial; and finally, before a jury at the penalty-phase trial."

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NOTEWORTHY NEWS

JUSTICE DEPARTMENT ISSUES OPT-IN REGULATIONS

On June 6, 2007, the Justice Department issued its opt-in regulations, setting forth procedures for states to follow to seek to implement provisions of the Streamlined Procedures Act (SPA), which was passed with the Patriot Act reauthorization bill.

cases involving prisoners who have exhausted their appeals and resume executions within the next few months, just in time for the 2008 election campaign between Attorney General Jay Nixon and incumbent governor Matt Blunt.

SUPREME COURT DISMISSES STATE'S CERT PETITION IN WILLIAM WEAVER CASE

By a 6-3 vote, the Supreme Court issued an opinion dismissing the attorney general's cert petition in William Weaver's case as improvidently granted.

MISSOURI EXECUTIONS LIKELY TO RESUME IN LIGHT OF EIGHTH CIRCUIT DECISION IN TAYLOR

In light of the recent Eighth Circuit decision in Taylor dissolving a lower court injunction that imposed a moratorium on Missouri executions, it appears very likely that Missouri will begin to clear the backlog of

IN THIS ISSUE

Noteworthy News... 1
U.S. Supreme Court... 2
Missouri Supreme Court... 5
Significant Decisions from the Eighth Circuit... 5
Significant Decisions from Other Circuits... 7
Significant Decisions from Other States... 10

based upon similar closing arguments delivered by the same prosecutor. One of the two men who obtained relief was Weaver's co-defendant Darryl Shurn. A more detailed description of the opinion in *Weaver* is set forth in the United States Supreme Court section below.

MISSOURI SUPREME COURT REVERSES GARY BLACK'S CONVICTION A SECOND TIME

The Missouri Supreme Court granted Missouri death row inmate Gary Black a new trial for a second time, based upon the fact that the trial court denied Black his right to self representation in violation of *Faretta v. California*. Mr. Black had previously obtained a reversal of his prior conviction and death sentence on an ineffective assistance of trial counsel claim. The opinion is chronicled in greater detail in the Missouri Supreme Court section below.

TWELFTH ANNUAL NATIONAL FEDERAL HABEAS CORPUS SEMINAR SCHEDULED FOR AUGUST 16-19, 2007, IN NASHVILLE

The annual National Federal Habeas Corpus Seminar is scheduled for August 16-19, 2007, in Nashville, Tennessee. Unlike previous years, this seminar will also include more programs for practitioners representing federal death row inmates challenging their convictions under 2255. For more information you can contact Chastain Smith at the administrative office of U.S. Courts at Chastain_Smith@ao.uscourts.gov. The deadline for applications is July 19, 2007.

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

***Danforth v. Minnesota*, 127 S.Ct. 2427 (2007).**

On May 21, 2007, the Court granted certiorari on the following question: Are State Supreme Courts required to use the standard announced in *Teague v. Lane* to determine whether United States Supreme Court decisions apply retroactively to state court criminal cases, or may a state court apply state law or state constitution-based retroactivity tests that afford

application of Supreme Court decisions to a broader class of criminal defendants than the class defined by *Teague*?

***Medellin v. Texas*, 127 S.Ct. 2129 (2007).**

After initially dismissing certiorari in a capital habeas case involving this Mexican national, the court granted certiorari to address the following questions arising from Texas state courts' subsequent failure to follow the President's executive order to enforce the decision from the International Court of Justice in *Avena*: (1) Did President of the United States act within his constitutional and statutory foreign affairs authority when he determined that the state must comply with the United States' treaty obligation to give effect to the *Avena* judgment? (2) Are state courts bound by the Constitution to honor the undisputed international obligation of the United States, under treaties duly ratified by the President with the advice and consent of the Senate to give effects to the *Avena* judgment in the cases that the judgment addressed?

OPINIONS

***Uttecht v. Brown*, 127 S.Ct. 2218, 2007 WL 1582998 (June 4, 2007).**

In this Washington capital case, the Supreme Court (5 to 4) reversed the Ninth Circuit's decision granting relief on respondent's *Witherspoon v. Illinois* challenge to the trial court's removal of a prospective juror for cause. The Court (Kennedy, J., joined by Roberts, C.J., and Scalia, Thomas and Alito, JJ.) began by reviewing its existing death qualification jurisprudence, which "establish at least four principles of relevance here:

First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor

of critical importance in assessing the attitude and qualifications of potential jurors.

Examining respondent's claim in light of these principles, the Court initially noted both that the voir dire record as a whole indicated that the trial judge had presided evenhandedly over the jury selection process, and that all prospective jurors had been provided with basic information about how a sentencing phase would proceed before individual voir dire was conducted. The Court then described the voir dire of the juror at issue - Juror Z - and observed that, notwithstanding the instructions he had received, the juror maintained "serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case." More specifically, the Court emphasized that while Juror Z had "no general opposition to the death penalty or scruples against its infliction," his voir dire responses expressed less certainty where - as was the case under Washington law - an opportunity for recidivism was foreclosed by the existence of life without parole as the only alternative to a death sentence. The Court also noted that after the prosecution lodged its challenge to Juror Z for cause, defense counsel stated, "We have no objection."

Turning to the Ninth Circuit's decision granting relief "years after the conclusion of the voir dire," the Court rejected the court of appeals' determinations that the state court's decision was contrary to and involved an unreasonable application of federal law. As to the former, the Court criticized the Ninth Circuit's conclusion that the state court's failure to make a finding that Juror Z was "substantially impaired" amounted to an application of the wrong legal standard. The Court explained that "[t]his is an erroneous summary of the State Supreme Court's opinion. The state court did make an explicit ruling that Juror Z was impaired." After identifying the location of that finding in the state court's opinion, the Court went on to add that, "[r]egardless, there is no requirement in a case involving the Witherspoon-Witt rule that a state appellate court make particular reference to the excusal of each juror. It is the trial court's ruling that counts." (citing *Early v. Packer*, 537 U. S. 3, 9 (2002) (per curiam)). As to the state court's application of the Witherspoon-Witt standard, the Court found that the trial court had been "well within its discretion in granting the State's motion to excuse Juror Z." The Court explained that the trial court could have found "substantial impairment" merely from the juror's emphasis on future dangerousness, which would be negated by the LWOP alternative to a death sentence. The Court also added the following:

[T]he trial court . . . is entitled to deference because it had an opportunity to observe the demeanor of Juror Z. We do not know anything about his demeanor, in part because a transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal. Nevertheless, the State's challenge, Brown's waiver of an objection, and the trial court's excusal of Juror Z support the conclusion that the interested parties present in the courtroom all felt that removing Juror Z was appropriate under the Witherspoon-Witt rule.... Juror Z's assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case because there was no possibility of release. His assurances did not require the trial court to deny the State's motion to excuse Juror Z.

The Court also emphasized that while the defense's failure to object did not operate as a default under state law, the fact that defense counsel "offered no defense of Juror Z" warranted consideration. This was so, the Court later explained, "because of frequent defense objections to the excusal of other jurors and the trial court's request that if both parties wanted a juror removed, saying so would expedite the process." "In that context," the Court concluded, defense counsel's "no objection" comment "was not only a failure to object but also an invitation to remove Juror Z."

Before concluding that neither the trial nor state supreme courts' decisions were contrary to or involved an unreasonable application of federal law, the Court observed as follows:

The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful voir dire, the trial court has broad discretion.

Justice Stevens (joined by Souter, Ginsburg and Breyer, JJ.) dissented, contending that the Court's decision constituted an erosion of the "strict rule" authorizing removal of a prospective juror only for "substantial impairment." Among other criticisms, Justice Stevens asserted as follows:

[T]he perverse result of [the Court's] opinion is that a juror who is clearly willing to impose the death penalty, but considers the severity of that decision carefully enough to recognize that there are certain circumstances under which it is not appropriate (e.g., that it would only be appropriate in "severe situations," App. 63), is "substantially impaired." It is difficult to imagine, under such a standard, a juror who would not be

considered so impaired, unless he delivered only perfectly unequivocal answers during the unfamiliar and often confusing legal process of voir dire and was willing to state without hesitation that he would be able to vote for a death sentence under any imaginable circumstance.

Justice Breyer (joined by Souter, J.) also dissented to emphasize that defense counsel's "no objection" remark after Juror Z's voir dire was "without significant legal effect" under state law, and should therefore "play no role in [the Court's] analysis."

Schriro v. Landrigan, 127 S.Ct. 1933 (2007).

In *Landrigan*, the Supreme Court, per Justice Thomas, reversed the en banc Ninth Circuit, and held that the District Court's denial of a federal evidentiary hearing to this capital habeas petitioner was not an abuse of discretion in light of the fact that trial record refuted the petitioner's post-conviction and habeas allegations of trial counsel's ineffectiveness in failing to investigate and present mitigation evidence.

The Court held that Landrigan's statements to the trial judge at the mitigation phase that he did not want his birth mother and ex-wife to testify on his behalf constituted an instruction to counsel not to present any mitigation evidence: "When the [] trial judge asked Landrigan if he had instructed his lawyer not to present mitigating evidence, Landrigan responded affirmatively. Likewise, when asked if there was any relevant mitigating evidence, Landrigan answered, 'Not as far as I'm concerned.'" Further in this phase, Landrigan repeatedly interrupted counsel's attempts to proffer evidence that could have been considered mitigating.

In sum, the Court held that "Landrigan would have undermined the presentation of any mitigating evidence that his attorney might have uncovered." . It specifically reversed the en banc Ninth Circuit's findings that Landrigan's statements referred only to the testimony of his birth mother and ex-wife; it then reversed the en banc court's remand for an evidentiary hearing.

The Court grounded its opinion on the premise that where, as here, "the record refutes the [habeas petitioner]'s factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." It rejected the proposition that Landrigan's decision not to present mitigating evidence had to be "informed and knowing," pointed out that this specific claim of "informed and knowing" was unexhausted, noted that trial counsel had explained the significance of mitigating evidence to Landrigan, and, ultimately, relied on Landrigan's statement to the trial

court that "I think if you want to give me the death penalty, just bring it right on. I'm ready for it."

The dissent (Stevens, Souter, Ginsburg, and Breyer, JJ.) would have held that any waiver of the presentation of mitigation evidence was neither informed nor knowing - especially as the evidence of the petitioner's serious psychological and organic brain disorder was discovered post-trial.

Roper v. Weaver, 127 S.Ct. 2022 (2007).

On a 6 to 3 vote, the Supreme Court dismissed as improvidently granted the writ of certiorari it had awarded to the warden in *Roper v. Weaver*. Its per curiam opinion noted that cert had been granted in order to examine whether the 8th Circuit had exceeded its authority under 28 U.S.C. sec. 2254(d)(1) in holding the prosecutor's closing argument was unfairly inflammatory. But, subsequent to its grant of cert, the Court became aware of the following circumstances, which persuaded it that dismissing the writ was appropriate. In particular, the Court learned that the same prosecutor had made the same closing arguments in two other death penalty cases (one of which being that of Weavers' co-defendant) in which habeas relief had been granted. Although those cases were pre-AEDPA cases, so too should have been Weaver's, were it not for the district court judge's erroneous dismissal of Weaver's habeas petition -- albeit "without prejudice" -- upon his filing for cert from the state court's denial of post-conviction relief. The Court definitively held that exhaustion of a claim does not require seeking of cert upon the denial of post-conviction relief, and that here, Weaver's habeas petition was not premature and no cause existed upon which to dismiss it. The Court ultimately held that regardless of whether the AEDPA applied to Weaver's petition, "it [was] appropriate to exercise [its] discretion to prevent these three virtually identically situated litigants from being treated in a needlessly disparate manner, simply because the District Court erroneously dismissed [Weaver]'s pre-AEDPA petition."

Fry v. Plilar, 127 S.Ct. 2321 (2007).

Regardless of whether the underlying state court decision applied the proper "*Chapman v. California*" test of prejudice on direct appeal - that is, whether the error complained of was harmless beyond a reasonable doubt - the federal habeas court must apply the more demanding habeas test of prejudice - that is, whether the error complained of had a substantial and injurious effect on the petitioner.

Bowles v. Russell, 127 S.Ct. 2360 (2007).

A Circuit Court of Appeals lacks jurisdiction over an appeal filed beyond the period allowed by the rule or statute despite a District Court's purported extension of time to file such appeal beyond the period allowed by rule or statute.

MISSOURI SUPREME COURT RECENT DECISIONS

***State v. Black*, ___ S.W.3d ___, 2007 WL1532725 (Mo. banc 2007).**

For a second time, the Missouri Supreme Court unanimously reversed Gary Black's conviction and death sentence for a 1998 murder in Joplin, Missouri. After his first conviction was reversed on ineffective assistance of counsel grounds, Black made a *pro se* request nearly a year before his retrial to represent himself, citing *Faretta v. California*. After he was repeatedly rebuffed by the trial court, Black also filed a complaint against his attorney with the chief disciplinary counsel. The supreme court had little difficulty in finding that the trial court's ruling compelling Black to be represented by an attorney violated his Sixth Amendment and state constitutional rights. All of the requirements set forth in *Faretta* were met here, in that Black made his request for self-representation unequivocally and in a timely manner and it was knowing and intelligent. Because a *Faretta* error is structural in nature, automatic reversal was required. The court noted at the end of its opinion, however, that in such situations, it is appropriate for trial courts to appoint standby counsel in case the defendant changes his mind.

***State ex rel. Wolfrum v. Wiesman*, ___ S.W.3d ___, 2007 WL 1470693 (May 22, 2007).**

In this writ of prohibition action brought by two public defenders from the Capital Trial Office, the court granted the public defenders a writ of prohibition, compelling the trial court to grant them a continuance, notwithstanding the fact that their client facing capital charges, filed a speedy trial request under the detainer statute, apparently because he was being held in solitary confinement in Potosi, awaiting trial on a previously unsolved 1994 case in which a DNA match was obtained while Johnson was serving time on a unrelated crime. The court resolved the tension between counsel's right to prepare the capital case and the Missouri's uniform detainer statute. The court held that

because the UMDDL allows a continuance "for good cause shown," the public defenders' assertion that they could not possibly represent Johnson competently without a continuance to prepare constitutes "good cause" under the provisions of the statute. Once a prisoner has exercised his Sixth Amendment right to counsel, the right to competent and prepared counsel trumps Johnson's right to a speedy trial under the UMDDL.

EIGHTH CIRCUIT DECISIONS

***Taylor v. Crawford*, ___ F.3d ___, 2007 WL 1583874 (8th Cir. June 4, 2007).**

In his 42 U.S.C. sec. 1983 case against Missouri officials, Plaintiff Taylor challenged the three-chemical procedure (sodium pentothal/thiopental, pancuronium bromide, and potassium chloride) used by Missouri to execute death row inmates as being cruel and unusual punishment. At the time Taylor filed suit, Missouri intended to abide by its unwritten procedure of administering a lethal combination of these three chemicals through an IV line inserted into the femoral vein. In its prior executions, Missouri had first injected 5 grams of sodium pentothal in order to render the inmate unconscious; then injected 60 milligrams pancuronium bromide in order to paralyze the inmate's muscles; and finally injected 240-milli-equivalent of potassium chloride to stop the inmate's heart. It followed each injection with a saline flush. The gravamen of Plaintiff Taylor's challenge was that if the first chemical, the sodium pentothal, did not sufficiently anesthetize him, he would feel the excruciating burning sensation of the third chemical, the potassium chloride, which it indisputably causes, traveling through veins to induce a heart attack. He would be prevented by the second chemical, the pancuronium bromide, from indicating that he felt the excruciating burning sensation of the potassium chloride..

An evidentiary hearing in the federal district court revealed additional information: Missouri does no toxicology reporting following an execution in order to ascertain the amount of chemicals contained in the inmate's body at the time of death; the amounts of chemicals listed on the execution logs are "approximations," rather than accurate representations of the amounts used; and the physician administering the chemicals, who has dyslexia (causing him to transpose letters and numbers), does not accurately record the amounts of the chemicals. Further, this

dyslexic physician, in the past, had altered chemical amounts without notifying the DOC's prison director. Additionally, the physician's monitoring of the inmate's anesthetic depth to ensure his unconsciousness consisted solely of observing his facial expression through a partially obstructed observation window from which he faces away.

Plaintiff Taylor's expert anesthesiologist agreed that the third chemical, potassium chloride, would be exceedingly painful if administered without previously obtaining adequate anesthetization of the inmate through the first chemical. He then criticized DOC's lack of a written protocol, the variations of the amounts of chemicals used from one execution to the next, and the inaccuracy of the medicine logs. He also opined that Missouri's three-chemical procedure required a state of anesthesia deep enough for surgery, and urged that additional independent monitoring be used in order to ensure the successful delivery of the chemicals into the inmate's bloodstream. Taylor's expert in femoral line placement, Dr. Johnson, testified that the femoral line placement, done per Missouri's unwritten protocol, produces an unreasonable risk of pain, which could be easily reduced by placing an IV on the top of the inmate's hand.

In contrast, DOC Director Crawford's anesthesiologist expert stated that an inmate's unconsciousness is achieved in the first 45 seconds of the injection of the sodium pentothal/thiopental, and that no pain beyond those 45 seconds would be susceptible to the inmate.

The District Court then ordered that Missouri's three-chemical procedure presented an unnecessary risk of unconstitutional pain during the lethal injection process: it identified concerns, and fashioned a detailed remedy setting forth requirements for DOC. In response, DOC submitted a new written protocol, but the Court found it lacking in sufficient constitutional protections. For example, the Court ordered DOC to remove the dyslexic anesthesiologist from the execution process, required a physician with anesthesia training to mix the chemicals, provided for the possibility of purchasing additional equipment to monitor anesthetic depth, and altered the record-keeping requirements.

In reversing this District Court order, the Eighth Circuit first held that a substantial risk that may exist in a lethal injection procedure sufficiently alleges actual unnecessary and wanton infliction of pain. ("We see no error in the district court's consideration of whether there is an unnecessary risk that the State's proposed lethal injection protocol will cause the unnecessary and wanton infliction of pain.") But "the focus of our inquiry is whether the written protocol inherently imposes a constitutionally significant risk of

pain." That is, "any risk that the procedure will not work as designated in the protocol is merely a risk of accident, which is insignificant in our constitutional analysis."

The only risk here that the procedure will not work as designated in the protocol "arises from the specific chemicals chosen by the State to carry out the sentence of death by lethal injection." As the Circuit held:

There is no dispute...that the third and last chemical chosen for use in this protocol" - potassium chloride - "will cause excruciating pain if the inmate is not adequately anesthetized and that the use of the second chemical" - pancuronium bromide - "in the sequence will simultaneously mask any visible sign of that pain. Because of those inherent properties of two of the chemicals chosen to carry out the sentence of death, we must carefully evaluate the designated procedure to determine whether it sufficiently safeguards against the infliction of this excruciating pain such that any lingering risk is not of constitutional magnitude.

The Circuit then methodically examined the DOC protocol, noted the DOC's post-argument informing of the court that the dyslexic anesthesiologist would not be employed to carry out executions, and analyzed the protocol's specific requirements: it found that the protocol did not fail to comply with Eighth Amendment standards prohibiting cruel and unusual punishment. That is, "[t]he concerns that the district court noted and required to be modified d[id] not rise to the level of creating a constitutionally significant risk of pain."

***Nicklasson v. Roper*, ___ F.3d ___, 2007 WL 1774516 (8th Cir. June 21, 2007).**

In this capital habeas case, the Court of Appeals unanimously upheld the denial of habeas relief to Missouri death row inmate Allen Nicklasson. The issues before the court on appeal involved challenges to the death qualification process during jury selection and a *Batson* challenge to the prosecution's use of two preemptory challenges to strike black veniremen. The death qualification issue involved the trial court's failure to ask follow-up questions after identifying sixteen jurors who gave apparently contradictory responses during the court-conducted voir dire, in which they stated they would automatically impose both the death penalty and life imprisonment if they convicted Nicklasson of first degree murder. Despite the contradictory nature of the answers by the sixteen venirepersons, the court refused to ask any follow-up questions or allow counsel to do so. Despite condemning the manner in which this voir dire was

conducted, the panel nevertheless held that they were powerless to grant Nicklasson relief under the standard of review provisions of the AEDPA because the Missouri Supreme Court decision affirming the conviction did not involve an unreasonable application of any Supreme Court case dealing with the death qualification process. As a result, the court was unable to find that the Missouri Supreme Court's application of established federal law, even if erroneous, was objectively unreasonable because Supreme Court precedent gives the trial court great discretion and leeway in conducting death qualification in capital cases.

The court also rejected a claim that the trial court unconstitutionally restricted counsel from voicing the jury on whether it would follow the diminished capacity instruction. Although the panel noted that there is Supreme Court precedent finding a constitutional violation in restricting voir dire on certain subjects such as racial bias, there is no case dealing with this specific issue. As a result, given the broad discretion afforded trial courts in conducting voir dire, Nicklasson was not entitled to relief because the Missouri decision was not unreasonable.

The court also denied relief on Nicklasson's *Batson* claim, rejecting the argument that pretext was established because similarly situated white jurors were not struck. One of the black jurors was reportedly excused because, in response to a death qualification question, stated that she would "probably" automatically impose life. A white juror who was not struck responded to the same question with the answer, "I believe so." In rejecting Nicklasson's argument that these answers are not sufficiently similar to show pretext, the panel engaged in the following semantic sleight of hand:

"It is reasonable to contend that a potential juror answering 'probably' would be more committed to a position than one answering 'I believe so.' 'Probably' presents a predictive assessment in the objective garb of statistical language, whereas 'I believe so' reflects a naked, subjective impression. Generally objective or quantifiable evidence is more persuasive and comprehensible than subjective or qualitative evidence."

The second black juror was struck because she worked as a child protection investigator for the Illinois Division of Family Services. Nicklasson argued that this reason was pretextual because a white venireperson who was a nurse specialist in child psychology, was not struck. The court held that the Missouri Supreme Court's decision that there are "quantum differences between the two jobs", despite the fact that both

occupations deal with child abuse, was not objectively unreasonable.

***Pierson v. Dormire*, ___ F.3d ___, 2007 WL 984104 (8th Cir. April 4, 2007).**

Relying on *Nichols v. Bowersox*, 172 F.3d 1068 (8th Cir. 1999)(en banc), the Eighth Circuit panel held that "a Missouri state prisoner's judgment becomes final within the meaning of 28 U.S.C. §2244(d)(1)(A) exactly ninety days after his conviction is affirmed on direct appeal, even if he has not filed a motion for transfer to the Missouri Supreme Court." Applying this holding to petitioner, the court reversed the district court's dismissal of his §2254 petition as untimely, and remanded for further proceedings.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

FIFTH CIRCUIT

***In re Lewis*, ___ F.3d ___, 2007 WL 1098434 (5th Cir. April 13, 2007).**

The Fifth Circuit denied petitioner's application for leave to file a second or successive petition raising an *Atkins v. Virginia* claim in this Texas capital case on the ground that it was one day late. Petitioner's initial federal habeas proceedings ended with the Supreme Court's denial of certiorari on March 3, 2003, and he was thereafter notified that his appointed counsel intended to do no further work on his case. Petitioner subsequently secured pro bono counsel, who filed a successive state habeas petition presenting his *Atkins* claim on June 20, 2003. This left petitioner with one day remaining on the federal limitations period applicable to the claim. The state court denied relief on December 6, 2006, and counsel mailed petitioner's application for leave to file a successor on December 7, 2006, but it was not received and clocked in at the clerk's office until December 8. After noting that "mailing is not the equivalent of filing," the Fifth Circuit went on to reject petitioner's request for equitable tolling. As to petitioner's contentions that his abandonment by appointed counsel and limitations on subsequent pro bono counsel's time excused the late filing, the court explained that "Lewis obtained his pro bono counsel on or soon after the day he received notice of his previous counsel's withdrawal, . . . leaving Lewis with over three months to file his state application. Under the circumstances of this case, three months was adequate time for Lewis to file his

application." The court also relied upon this three month period to conclude that Texas's former "two forum rule" did not prevent a timely filing.

Additionally, in footnote 20 the court rejected "Lewis's contention that . . . the limitations period should not apply to the claim that a person is mentally retarded." The court explained that "[w]e have previously applied the limitations period to *Atkins* claims, including a claim in which the petitioner had made a prima facie showing of mental retardation," (citing *In re Wilson*, 442 F.3d 872 (5th Cir. 2006)), but did not discuss the fact that *Wilson* did not involve a holding that a prisoner allegedly ineligible for a death sentence would be refused federal review of his claim.

SIXTH CIRCUIT

***Matthews v. Ishee*, ___ F.3d ___, 2007 WL 1296732 (6th Cir. May 4, 2007).**

Before reaching petitioner's *Brady v. Maryland* claim and reversing the district court's grant of relief in this Ohio murder case, the Sixth Circuit observed as follows with regard to its review of state court factual findings: "A state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding' only if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not have support in the record."

Turning to the merits of petitioner's contention that the prosecution violated *Brady* by failing to disclose the existence of deals with two key witnesses, the court found petitioner's arguments as to one of the witnesses were foreclosed by a state court finding that the deal was not made until after petitioner's trial. As to the deal with the other witness, the court noted petitioner's concession that the claim was procedurally defaulted as a result of his failure to present it in state court with the statutorily prescribed period, and found that petitioner had not shown cause to excuse this delay. Rejecting petitioner's contention that his discovery of the deal was impeded by the prosecutor's assurances that no deal existed, the Sixth Circuit found two distinctions between this case and *Strickler v. Green*, 527 U.S. 263 (1999). First, the proceeding at which the prosecution witness withdrew his earlier plea, pled anew to reduced charges, and received a reduced sentence "were all public information." The court explained that "[w]here, like here, 'the factual basis for a claim' is 'reasonably available to' the petitioner or his counsel from another source, the government is under no duty to supply that information to the defense." Second, the court found that because petitioner's

counsel had previously discovered the existence of a deal between the prosecution and its other key witness, petitioner should have grown sufficiently suspicious of the prosecution's representations to initiate an investigation of the public records. The court reasoned that "Matthews's failure to check the public records after being put on notice was his own failure, and not a failure caused by the assistant prosecutor or some other external factor."

***Ramonez v. Berghuis*, ___ F.3d ___, 2007 WL 1730096 (6th Cir. June 18, 2007).**

In this non-capital habeas case, the Sixth Circuit reversed the district court's denial of habeas relief, and rejected as unreasonable the underlying state court decision holding that trial counsel provided effective assistance despite failing to interview and present testimony from three people who witnessed the alleged crime.

Ramonez was convicted on home invasion, assault, and aggravated stalking charges. While Ramonez' ex-girlfriend and mother of his two children, Christina Fox, testified that he forced his way into her house, knocked her to the ground and began to strangle her, Ramonez testified that Fox had invited him inside, he helped her up when she fell, and he did not choke her. The defense witnesses-to-be – Charles Tames, Rene Tames, and Joel Hackett, all of whom drove in the car with Ramonez to his Fox's house – would have testified that, from their vantage point in the car, they saw Ramon and he neither forced his way into Fox's house nor choked her.

After holding an evidentiary hearing on Ramonez' motion for a new trial, the trial court found that Hackett was not a helpful witness, that Rene was an "incredible" witness, and that trial counsel's strategic decision (asserted to the judge at the close of the prosecution's case at trial) not to call any witnesses "because of his trial strategy to focus on what occurred inside the house and his expectation that the witnesses could not offer competent testimony in that regard, due to what he thought was their limited vantage point outside the house," *Ramonez* at *3, was a reasonable decision. The state appellate court affirmed these findings.

The Sixth Circuit reversed, first holding that, consistent with its decision in *Combs v. Coyle*, a capital habeas case granting relief to the petitioner, the performance and prejudice elements of an ineffectiveness claim are mixed questions of fact and law, rather than questions of pure fact governed by 28 U.S.C. sec. 2254(e)(1)'s presumption of correctness. It then held that:

[a]s the district court's opinion makes clear, the state court focused largely on the notion that [trial counsel]'s decision not to call the three witnesses was rooted in what it perceived to be a reasonable trial strategy – one of focusing on undermining Fox's credibility as to what happened between her and Ramonez inside the house – and because the three witnesses were never inside the house, [trial counsel] thought that they could add little to that effort. But that belief was grounded on a fatally flawed foundation, for if [trial counsel] had only engaged in the minimal – and essential – step of interviewing the witnesses, he would have learned that they *could* testify as to what took place in the house, and that their testimony would have supported Ramonez's version of events.

That being so, the state court ignored the central teaching of *Strickland* [*v. Washington*, 446 U.S. 668 (1984)], as reaffirmed by *Wiggins* [*v. Smith*], 539 U.S. [510,] 522-23 [(2003)] that the investigation leading to the choice of a so-called trial strategy must itself have been reasonably conducted lest the “strategic” choice erected upon it rest on a rotten foundation. *Towns* [*v. Smith*, 395 F.3d 251,] 258 [] made that same point:

A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.

The Sixth Circuit rejected the defendant-warden's claims that trial counsel's decision not to interview the eyewitnesses was reasonable because that decision was based only on counsel's belief that they could not provide information about what had occurred inside of Fox's house. In fact, trial counsel knew from Ramonez that the witnesses both were present at Fox's house and saw her invite him into her house (thus contradicting her preliminary hearing testimony that he forced his way in). As such, his decision not to interview witnesses who could undermine Fox's story – which is exactly what his trial strategy was – was objectively unreasonable. As the court held, “[c]onstitutionally effective counsel must develop trial strategy in the true sense – not what bears a false label of ‘strategy’ – based on what investigation reveals witnesses will actually testify to, not based on what counsel guesses they might say in the absence of a full investigation.”

Finally, regarding prejudice, the court held that there was a reasonable probability that the eyewitnesses' testimony, which would have corroborated Ramonez' testimony and contradicted Fox's testimony, could have influenced the jury in this case. In so holding, the court noted that a state court's credibility assessment of an witness is not a state court finding of fact subject to 28 U.S.C. sec. 2254(e)(1)'s

presumption of correctness, and that it is for a jury, not a court, to decide a the credibility of a witness.

NINTH CIRCUIT

Lopez v Schriro, ___ F.3d ___, 2007 WL 1760589 (9th Cir. June 20, 2007).

In this capital habeas case, the Ninth Circuit reversed the district court's finding of non-exhaustion of a habeas claim of ineffective assistance of counsel at the mitigation phase alleging counsel's failure to investigate and present evidence of the petitioner's organic brain damage, sexual assault as a child, dysfunctional childhood, good employment, and remorse for the crime. The Circuit held that the petitioner had briefed this issue in the state post-conviction trial court (despite failing to include it in his initial post-conviction petition), and that, in fact, an evidentiary hearing was held by that court which addressed counsel's obligations as well as specific failures to discover and present evidence of the petitioner's dysfunctional childhood with alcoholic parents and beginning to drink alcohol at an early age. After the post-conviction trial court held that the petitioner's alcohol abuse was insufficient to warrant leniency, the petitioner appealed this holding to the state supreme court. He included in his statement of issues the claim that counsel's abandonment “at the trial and/or sentencing” prejudiced him. He cited *Strickland v. Washington*, 446 U.S. 668 (1984), in his petition for review, and argued that:

Mr. Bruner [trial counsel] for all appearances turned over the mitigation preparation to Ms. Marshall, his junior counsel, who had previously done no serious trials including murder and/or death penalty trials. Mr. Bruner gave no direction to Dr. Morris [evaluating psychiatrist] as to the evaluation, other than Mr. Bruner wanted to know about “overall personality dynamics, and things of this nature. Wasn't asking for anything specific to help the case, but was interested in learning more about the psychological makeup of Mr. Lopez.” Most importantly, Dr. Morris was not asked to evaluate or render an opinion as to the statements given by Mr. Lopez to law enforcement. Mr. Bruner believed that the death penalty would not be imposed in this case and prepared accordingly.

The state supreme court denied relief.

The Ninth Circuit held that these arguments, plus the evidence in the state court record of the petitioner's dysfunctional childhood and alcoholism, constituted a sufficient allegation of the denial of a federal constitutional right. It was of no consequence that habeas counsel had conceded partial unexhaustion of this claim of ineffectiveness, as the Circuit said that

it could, on its own, independently review a state court record for exhaustion purposes. The Circuit then granted a COA on this issue and remanded the case to the district court for further proceedings, including the determinations of whether the petitioner was eligible to expand the record under Habeas Rule 7 and/or to receive an evidentiary hearing.

The Circuit denied relief on the petitioner's other arguments, including the arguments that (1) the state trial court's failure to consider and give effect to the mitigating evidence that was presented; (2) the state supreme court failed to meaningfully and independently review the death sentence; and (3) trial counsel was ineffective for failing to object to the admission of evidence of non-fatal injuries identified by the state's medical examiner.

TENTH CIRCUIT

Young v. Sirmons, ___ F.3d ___, 2007 WL 1417284 (10th Cir. May 15, 2007).

Before addressing the merits and affirming the denial of relief in this Oklahoma capital case, the Tenth Circuit reiterated its previously established position that §2254(d) does not apply "when a federal district court holds an evidentiary hearing and considers new evidence that was not before the state court at the time it reached its decision, even if the state court resolved the claim on the merits." The court also observed, without further elaboration, that "[w]hen a petitioner seeks relief under the second prong of AEDPA [§2254(d)(2)], the petitioner bears the burden of showing by clear and convincing evidence that the state court's factual determination is erroneous."

SIGNIFICANT DECISIONS FROM OTHER STATES

FLORIDA

Offord v. State, ___ So.2d ___, 2007 WL 1499177 (Fla. May 24, 2007).

The Florida Supreme Court held that a death sentence imposed upon a defendant with a history of serious mental illness was disproportionate under that state's death penalty law. The defendant was found guilty of murdering his estranged wife by repeatedly

striking her in the head with a hammer. In his confession, he admitted the crime and stated that it occurred while he was experiencing auditory hallucinations. The trial court sentenced him to death, stressing the aggravator that the murder was particularly heinous, atrocious and cruel, despite evidence that showed the defendant had been diagnosed with and treated for mental problems, including schizophrenia, from an early age. Under its proportionality review law, the court compared the facts of this case to other cases where the HAC aggravating factor was the sole aggravator. Based upon the facts surrounding his mental illness, the court resentenced Offord to life under its proportionality review scheme, finding that the mitigating evidence outweighed the single aggravating circumstance found by the sentencing judge.

LOUISIANA

State v. Kennedy, ___ So.2d ___, 2007 WL 1471652 (La. May 22, 2007).

The Louisiana Supreme Court rejected an Eighth Amendment challenge to a Louisiana statute authorizing the death penalty for the rape of a child, where no homicide occurs. The defendant was sentenced to die under a 1995 state law, in which Louisiana became the first U.S. jurisdiction to authorize the death penalty as punishment for raping someone who is under twelve years of age. The court distinguished *Coker v. Georgia*, stressing the fact that that it held that the rape of an adult woman cannot constitute a capital crime without running afoul of Eighth Amendment principles. Applying the more recent test from *Atkins* and *Roper*, the court began by noting that only five of the thirty-eight death penalty states have a capital punishment law for child rapists. However, the court noted that fourteen of the thirty-eight states and the federal system authorize a death sentence for some non-homicide offenses. In light of the fact that approximately thirty percent of the death penalty jurisdictions allow capital punishment for non-homicide offenses, there is no strong showing one way or another that there is a strong consensus against imposing the death penalty for a non-homicide offense.

The court then proceeded to the second step of Eighth Amendment analysis, considering whether capital punishment for the rape of a child is disproportionate. In rejecting Kennedy's arguments, the court stressed the heinous nature of child rape and noted that unlike death sentences for juveniles and mentally retarded people, death sentences for child rapists will further the ultimate punishment's goal of deterrence and retribution.

The court also rejected several policy arguments advanced by Kennedy to justify striking down the law, including the fact that authorizing the

arguments should be advanced before the legislature in our constitutional system.

death penalty for rape will encourage rapists to murder their victims; requiring a child rape victim to endure a capital trial increases the trauma to the victim; and, relying on the allegations of children increases the likelihood of wrongful capital convictions. The court noted that the state advanced equally valid responses to each of these concerns. In addition, the court held that policy arguments are largely irrelevant to the appropriate Eighth Amendment analysis. Such

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THE CURRENT ISSUE OF THIS NEWSLETTER IS ALSO AVAILABLE



NOTEWORTHY NEWS

STEVEN PARKUS REMOVED FROM DEATH ROW

TheMcKellarGroup.com

In the culmination of a lengthy legal battle lasting more than a decade on issues regarding Missouri death row inmate Steven Parkus' mental illness, we are thrilled to report a happy ending in the case. The Missouri Supreme Court has unanimously upheld a circuit court decision finding Mr. Parkus mentally retarded and ordered him to be resentenced to life without parole. After 20 years on death row, we are hopeful that Mr. Parkus will finally be placed in a setting in which his serious mental illness can be effectively treated. A more detailed analysis of the Missouri Supreme Court's decision is set forth below.

MISSOURI SUPREME COURTS FINDS BATSON VIOLATION IN SECOND CAPITAL TRIAL INVOLVING VINCENT MCFADDEN

In a 5-2 decision, Missouri Supreme Court reversed a second St. Louis County conviction and death sentence imposed against Vincent McFadden, finding that St. Louis County prosecutors excluded a black juror in violation of the *Batson* decision. This decision is the latest salvo in an encouraging trend by Missouri courts of putting some teeth back into the *Batson* decision after a lengthy period where reversals under *Batson* were few and far between in the last fifteen years. Prosecutors were undoubtedly trained after *Batson* to offer subjective explanations for strikes, such as appearance and employment, and trial and appellate courts turned a blind eye to this practice for years. The opinion is chronicled in the Missouri Supreme Court section below.

INNOCENCE PROJECT FUNDRAISER IS SCHEDULED FOR MAY 10 IN KANSAS CITY

On May 10, 2007, a fundraiser is scheduled for the Midwestern Innocence Project, featuring author John Grisham, who recently wrote a best selling book, [An Innocent Man](#). It is about the case of Ron Williamson, who was wrongly convicted of a capital crime, and his co-defendant Dennis Fritz, a Kansas City native, wrongly convicted of the same murder in Oklahoma. Both were later exonerated.

LET US KNOW IF YOU HAVE MOVED

We have had a lot of newsletters returned due to changes of address. If you have moved, please let us know so we can update our records and you can continue to receive your newsletter in an uninterrupted manner.

The fundraiser will be held at the Hyatt Crown Center in the Ballroom and Foyer, beginning with cocktails at 6:00 p.m. and dinner at 6:30. Dress will be business attire. Single tickets are \$125 per person and tables of 10 are \$1,250. For more information, contact Annie Preseley with the McKellar Group at (816)472-4700 or email InnocenceProject@

IN THIS ISSUE

<i>Noteworthy News</i>	<i>1</i>
<i>U.S. Supreme Court</i>	<i>2</i>
<i>Missouri Supreme Court</i>	<i>3</i>
<i>Significant Decisions from the Eighth Circuit</i>	<i>4</i>
<i>Significant Decisions from Other Circuits</i>	<i>4</i>
<i>Significant Decisions from Other States</i>	<i>7</i>

U.S. SUPREME COURT RECENT DECISIONS

Whorton v. Bockting, 127 S.Ct. 1173 (2007).

In this Arizona child molestation case, the Supreme Court unanimously held that *Crawford v. Washington*, 541 U.S. 36 (2004), announced a "new rule" within the meaning of *Teague v. Lane*, 489 U.S. 288 (1989), and that *Crawford's* rule did not satisfy either *Teague* exception against retroactive application on collateral review. Writing for a unanimous Court, Justice Alito first found that "it is clear that *Crawford* announced a new rule. The *Crawford* rule was not 'dictated' by prior precedent. Quite the opposite is true: The *Crawford* rule is flatly inconsistent with the prior governing precedent, [*Ohio v.*] *Roberts*, [448 U.S. 56 (1980),] which *Crawford* overruled."

Turning to whether *Crawford's* rule satisfied *Teague's* second exception - for "watershed" rules - the Court noted that "[i]n order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent 'an "impermissibly large risk"' of an inaccurate conviction. Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" Explaining that "the question" under the first of these requirements "is whether the new rule remedied 'an "impermissibly large risk"' of an inaccurate conviction," the Court used *Gideon v. Wainwright*, 372 U.S. 335 (1963), as its yardstick and found that "[t]he *Crawford* rule is in no way comparable to the *Gideon* rule" because *Crawford* is far less sweeping than *Gideon*, and in fact, "[i]t is . . . unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials." The Court went on to add that, in any event, "the question here is not whether *Crawford* resulted in some net improvement in the accuracy of fact finding in criminal cases. Rather, "the question is whether testimony admissible under *Roberts* is so much more unreliable than that admissible under *Crawford* that the *Crawford* rule is 'one without which the likelihood of an accurate conviction is seriously diminished.'" "*Crawford*," the Court answered, "did not effect a change of this magnitude."

The Court also found that *Crawford* "did not 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" "[I]n order to meet this requirement," the Court explained, "a new rule must itself constitute a

previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding." Again citing *Gideon* as the paradigm, the Court declared that "*Crawford*, while certainly important, is not in the same category as *Gideon*."

Smith v. Texas, ___ S.Ct. ___, 2007 WL 1201586.

In a 5-4 decision, the United States Supreme Court once again overturned a death sentence because the unique Texas statutory special issues scheme is unconstitutional. In the *Smith* case, the trial took place between the two *Penry* decisions. The Supreme Court previously reversed and remanded this case by finding *Penry* error in the instructional scheme. After remand, the Texas Court of Appeals again denied relief by finding that *Smith* had not properly preserved a *Penry* challenge. As a result, he could not prevail unless he showed egregious harm, a burden he could not meet. In an opinion by Justice Kennedy, the court first rejected the state's argument that the state decision rested on an independent and adequate state ground. As a result, *Smith* is entitled to relief under the second *Penry* decision because he established that the improper special issues instruction caused him "some harm."

Abdul-Kabir v. Quarterman ___ S.Ct ___, 2007 WL 1201582.

In this Texas capital habeas case, the same Supreme Court majority overturned a Texas death sentence based upon a *Penry* issue similar to that addressed in *Smith*. In a decision authored by Justice Stevens, the majority rejected the state's argument that the petitioner was not entitled to relief under the standard of review provisions of AEDPA, finding the Texas decision upholding the death sentence was contrary to and involved an unreasonable application of Supreme Court precedent at the time the conviction became final in 1990.

The majority based its decision on the view that jurisprudence from the court prior to *Penry I* made it clear that sentencing juries must be able to give meaningful consideration to all mitigating evidence, citing *Woodson* and *Lockett*. In denying the petitioner's *Penry* claim, the Texas courts did not properly analyze the case under *Penry*. If it had, the court would have had to conclude that the Texas special issues framework did not allow the sentencer to consider testimony from petitioner's family and experts suggesting that his dangerous character resulted from his disadvantaged childhood and his neurological damage. Instead of relying on the first *Penry* decision, the Texas courts relied on three later state cases and the Supreme Court decision in *Graham v. Collins* to deny relief. The majority concluded that, it is clear that the Texas

scheme did not pass constitutional muster under *Lockett* and *Penry I* because the sentencer could not give meaningful effect and a "reasoned moral response" to petitioner's mitigating evidence.

***Brewer v. Quarterman*, ___S.Ct.____, 2007 WL 1201609 (2007).**

In this companion case to *Abdul-Kabir v. Quarterman*, the Supreme Court granted relief from petitioner's death sentence on the ground that "the former Texas capital sentencing statute impermissibly prevented his sentencing jury from giving meaningful consideration to constitutionally relevant mitigating evidence." Referencing the more extended discussion set forth in *Abdul-Kabir*, the Court observed that it has "repeatedly emphasized that a *Penry* violation exists whenever a statute, or a judicial gloss on a statute, prevents a jury from giving meaningful effect to mitigating evidence that may justify the imposition of a life sentence rather than a death sentence. We do so again here, and hold that the Texas state court's decision to deny relief to Brewer under *Penry I* was both 'contrary to' and 'involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' 28 U. S. C. §2254(d)."

As in *Abdul-Kabir*, the trial court in petitioner's case refused all requested charges "designed to give effect to the mitigating evidence," and the prosecution urged the jury to focus strictly on answering the Texas special issues as they had been posed. And as in *Abdul-Kabir*, petitioner's "mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." Acknowledging the possibility that petitioner's "mitigating evidence was less compelling than *Penry's*," the Court made clear that neither this "difference" nor the Fifth Circuit's characterizations of the "quantity, degree or immutability" of petitioner's evidence could "provide an acceptable justification for refusing to apply the reasoning in *Penry I* to this case." Rather, the Court explained, even "[u]nder the narrowest possible reading of . . . *Penry I*, the Texas special issues do not provide for adequate consideration of a defendant's mitigating evidence when that evidence functions as a 'two-edged sword.'" Here, the Fifth Circuit's reversal of the district court's grant of relief on petitioner's claim "mischaracterized the law as demanding only that [mitigating] evidence be given 'sufficient mitigating effect,' and improperly equated 'sufficient effect' with 'full effect.'" "This," the Court explained, "is not consistent with the reasoning of" *Penry v. Johnson*, 532 U. S. 782 (2001) (*Penry II*), and "has 'no foundation in

the decisions of this Court.'" (quoting *Tennard v. Dretke*, 542 U. S. 274, 284 (2004)). The Court concluded by adding that the Fifth Circuit's reasons for denying relief in this case "fail to heed the warnings that have repeatedly issued from this Court regarding the extent to which the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death."

MISSOURI SUPREME COURT RECENT DECISIONS

***In the matter of the competency of Steven Parkus*, ___S.W.3d ___, 2007 WL 1128882 (Mo. banc 2007).**

In 1999, after Steven Parkus had exhausted all of his appeals, the Missouri governor stayed his execution until a circuit court could determine whether Parkus was mentally competent to be executed under Missouri law. Before such a hearing took place, the Missouri legislature passed a bill excluding the mentally retarded from capital punishment. In the following year, the United States Supreme Court issued the *Atkins* decision. Thereafter, Parkus filed alternative actions to recall the mandate and for habeas corpus in the Supreme Court citing the Missouri MR statute and *Atkins*. The court remanded the case to the circuit court for a competency hearing and a mental retardation determination. The trial court decided to bifurcate these matters into separate hearings. After holding a hearing on the retardation issue, the trial court found that Parkus was mentally retarded and that his sentence should be reduced to life in imprisonment without parole.

On the state's appeal, the court in *per curiam* opinion, unanimously concluded that trial court did not abuse its discretion in bifurcating the hearing and that the circuit court's decision that Parkus is mentally retarded was supported by the record and did not erroneously declare or apply the law. The court also determined that because the mental retardation question is a civil action, the state has the right to appeal an adverse determination under §512.020 R.S.Mo. (2000).

In affirming the mental retardation finding, the court held that the proper standard of review is the same as for a court tried case in a civil action. Under this standard, the trial court's decision will be upheld unless there is no substantial evidence to support the decision, it is against the weight of the evidence or, erroneously

declares or applies the law. Under this standard, the court held that, although it was a close question, there was significant evidence in the record to support the determination that Parkus is mentally retarded, based upon his numerous mental evaluations from age eight to age seventeen which established that Parkus had limited intellectual functioning and adaptive deficits.

Finally, the court set forth the proper procedure to follow to pursue post-conviction mental retardation claims under state law and *Atkins*. In such cases, a capital defendant claiming he is mentally retarded must file a writ of mandamus before the Supreme Court in which the respondent is the director of the Department of Corrections and the Attorney General. The defendant must state specific facts indicating mental retardation and, if there is a factual dispute, the court will appoint a special master. If a defendant is determined to be mentally retarded, it will make its writ of mandamus absolute, recall its mandate in the defendant's direct appeal and resentence him to life imprisonment without parole.

***State v. McFadden*, ___ S.W.3d ___, 2007 WL 827422 (Mo. banc 2007).**

In the second capital case involving Vincent McFadden arising from St. Louis County, the court, in a 5-2 decision found that the prosecutor improperly struck a black female juror in violation of *Batson v. Kentucky*. The state attempted to justify the strike of the female juror by claiming that she did not have a driver's license, had "crazy red hair," and seemed hostile. The trial court rejected the state's justifications based upon the driver's license and hostility. However, the trial court allowed her to be struck based upon her bright red hair. In evaluating whether this reason was pretextual, the Supreme Court determined that it is not necessary to show that a similarly situated white juror had distinctive hair. Instead, the proper consideration should be the plausibility of the prosecutor's explanation in light of the totality of the facts and circumstances surrounding the case. Applying this standard, the court held that because the issue of whether this explanation was race neutral is dubious, coupled with the fact that the state did not articulate how the juror's hair style was related to the case, indicated that the justification was pretextual.

In addition, the court found that McFadden's death sentence was imposed in violation of *Johnson v. Mississippi* because it was based upon an aggravating factor involving his prior conviction and death sentence that the court had also previously reversed on *Batson* grounds. In reaching this determination, the court rejected the state's argument that evidence of the other murder, despite the reversal of the conviction, was still

admissible as other bad acts evidence. Even assuming the prosecution's argument is correct, the court could not conclude that the jury's weighing process was unaffected by its knowledge that McFadden was already sentenced to death for another murder.

EIGHTH CIRCUIT DECISIONS

***Morales v. Ault*, 476 F.3d 545 (8th Cir. 2007).**

In this course of affirming the denial of relief in this "sad and difficult" Iowa child murder case, the Eighth Circuit majority described the requirements for satisfying §2254(d)(2) as follows: "[A] state court decision involves 'an unreasonable determination of the facts in light of the evidence presented in the state court proceedings' only if it is shown that the state court's presumptively correct factual findings are rebutted by 'clear and convincing evidence' and do not enjoy support in the record. 28 U.S.C. § 2254(d)(2), (e)(1).

***Clay v. Norris*, ___ F.3d ___, 2007 WL 1201753 (8th Cir. 2007).**

In this non-capital Arkansas habeas case, the court affirmed the denial of relief to Michael Clay finding that his failure to file an abstract with his brief in his state post-conviction appeal was an adequate and independent procedural ground to deny habeas relief. The court rejected Clay's argument that the rule requiring an abstract with a brief is not consistently or regularly applied. The panel concluded that this rule is consistently applied in situations, as here, where the defendant does not abstract parts of the record that are relevant to the claims briefed on appeal.

OTHER CIRCUITS

SECOND CIRCUIT

***McKithen v. Brown*, 481 F.3d 89 (2nd Cir. 2007).**

In this §1983 case, the court remanded the case to consider whether there is a constitutional right to post-conviction DNA testing to establish innocence. The panel held that this lawsuit was not barred by either the *Rooker-Feldman* doctrine, nor the *Heck v. Humphrey* rule requiring such claims be raised in habeas corpus. The court remanded the case for the district court to determine in the first instance whether a constitutional right exists allowing a prisoner claiming innocence access to DNA testing. However, the court did not address the state's claim of collateral estoppel based upon the fact that McKithen raised a similar claim in state court which was adversely decided. The court believed that this issue would be better addressed by the district court after remand if it finds there is a constitutional right to post-conviction testing.

FIFTH CIRCUIT

***Moody v. Quarterman*, 476F.3d 260 (5th Cir. 2007).**

A majority of the Fifth Circuit panel vacated the district court's grant of relief on petitioner's *Batson v. Kentucky* claim in this Texas capital case, finding that the "district court failed to give proper deference to the Texas Court of Criminal Appeals' (CCA) findings of fact" on step three of the *Batson* analysis. The majority began by agreeing with petitioner and the district court that the Texas trial court acted contrary to, and unreasonably applied, *Batson* and *Powers v. Ohio* by rejecting petitioner's challenge to the prosecution's use of peremptory strikes on the sole ground that petitioner was white and therefore lacked standing to raise his Equal Protection claim. However, the majority disagreed with the district court's conclusion that the CCA's determination that petitioner had not carried his burden of proving discriminatory intent after the prosecutor volunteered a facially race neutral explanation for striking the juror in question. The majority acknowledged that petitioner had never been afforded an actual *Batson* hearing (the district court found that the passage of time made a retrospective hearing impossible), and that the trial court's handling of the *Batson* objection left trial counsel with no opportunity to argue step three at that time. However, the majority went on to hold that petitioner's failure to argue *Batson's* third step on direct appeal to the state appellate court "precludes a finding that the [CCA's] determination [that the prosecutor had not acted with discriminatory intent] was unreasonable [under §2254(d)(2)]." Without discussing how or why both §2254(d)(2) and §2254(e)(1) applied to the state court's finding, the majority also noted that petitioner had "not

rebutted [the state appellate court's] findings by clear and convincing evidence." Finally, the majority acknowledged that "[t]he district court's opinion and Moody's argument that the third stage of the *Batson* test necessarily requires a trial judge, not a reviewing appellate court, to scrutinize the demeanor, and thereby, the credibility of a prosecutor's offering are quite forceful and are indeed supported by the Supreme Court's own admonition." The majority went on to find, however, that petitioner "did not argue that the prosecutor's demeanor demonstrated that his reasons for striking [the juror] were pretextual; indeed, Moody has made no argument that the prosecutor's reasons were pretextual. Consequently, we cannot conclude that the state court's determination that the prosecutor did not strike [the juror] because of his race was unreasonable in light of this record."

Judge Dennis issued a lengthy and detailed dissent, accusing the majority of "scout[ing] for a way to say that the CCA's decision, although flatly contrary to *Batson*, was not unreasonable," and contending, inter alia, that, "[i]n the final analysis, the CCA's decision . . . is, at best, a review of a hypothesized three-step inquiry that was never made by the state trial court, or, at worst, rank speculation that the prosecutor's uninvited, unaccepted, and untraversed faux-proffer concerning [the juror] must have been the true basis for the prosecutor's peremptory challenge."

SIXTH CIRCUIT

***Ege v. Yukins*, ___ F.3d ___, 2007 WL1191911 (6th Cir. 2007).**

In this non-capital Michigan habeas case, the court granted habeas relief to petitioner finding that the introduction of scientifically unreliable bite mark evidence violated due process.

As a threshold matter, the court rejected the state's argument that the petition should have been dismissed because it was filed more than a year after petitioner had exhausted her state court appeals and was outside the statute of limitations. The panel rejected this argument, finding that one of the factual predicates for the claim, the fact that the state's expert had been discredited because of erroneous bite mark identifications in other cases, did not become known to petitioner until a few months after state appeals ended and the limitation period was tolled while petitioner pursued state post-conviction relief on this issue.

In assessing the due process claim, the critical fact was the expert's trial testimony that none of the other three and a half million people in the Detroit metropolitan area would have a similar bite mark pattern to the one that he matched to the defendant on

the victim's body. The state decision, while noting that such testimony lacked the proper foundation, denied relief by finding insufficient prejudice because the defendant presented the contrary opinions of its own experts. The court held that this conclusion was based upon an unreasonable application of the Supreme Court decision in *Chambers v. Mississippi*. The court also found that there was no procedural bar to this claim based upon trial counsel's failure to object because cause existed due to the ineffectiveness of counsel.

***Foley v. Parker*, 481 F.3d 380 (6th Cir. 2007).**

In the course of affirming the district court's denial of relief in this Kentucky capital case, the Sixth Circuit panel held that it would "ignore interpretations of *Strickland* by the Supreme Court in cases such as *Rompilla v. Beard*, 545 U.S. 374 (2005), and *Wiggins v. Smith*, 539 U.S. 510 (2003), which were decided after the Kentucky Supreme Court's adjudication of Foley's claim." "Foley's reliance on our court's interpretations of *Strickland* in cases such as *Harries v. Bell*, 417 F.3d 631 (6th Cir.2005), and *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003)," the court continued, "is similarly misplaced. Our sole question with respect to this claim, then, is whether the Kentucky Supreme Court's *Strickland* application was unreasonable."

Judge Martin concurred in the court's denial of relief on petitioner's ineffective assistance of counsel claim, but wrote separately to express concern about the refusal to consider *Wiggins*, both because that decision "only clarified *Strickland*," and because another Sixth Circuit decision - *Slaughter v. Parker*, 450 F.3d 224 (6th Cir. 2006) - permitted consideration of *Wiggins* in a case rejected by the state courts before *Wiggins* came down. Judge Martin also reiterated that the inconsistency in the Sixth Circuit's §2254(d)(1) decisions "counsels in favor of en banc review," and noted his belief that "this Court's inflexible reading of § 2254(d)(1)'s unreasonable application prong 'offends the judicial power under Article III.'" (quoting *Davis v. Straub*, 445 F.3d 908 (6th Cir. 2006)). "There is a difference," Judge Martin went on to explain, "between cases that present new law and those that present nuanced law: our ability to make use of the former on collateral review may well be properly restricted by *Teague v. Lane*, 489 U.S. 288 (1989), whereas our ability to make use of the latter seems unconstitutionally restricted by an overly narrow reading of §2254(d)(1)." Judge Martin also noted that "[t]he circuit courts, as well as the Supreme Court, seem to have put the cart before the horse by 'tacitly assuming' the constitutionality of AEDPA in general and § 2254(d)(1) in particular." He added: "Should we continue to read

§2254(d)(1) so narrowly, so as to allow only snapshots of 'what once was the law,' or should we consider this provision more broadly, so as to allow us our rightful room to interpret the law within Article III? Much like some members of the Ninth Circuit have done, I would encourage my own colleagues to at least consider tackling this constitutional question."

SEVENTH CIRCUIT

***Moore v. Battaglia*, 476 F.3d 504 (7th Cir. 2007).**

The Seventh Circuit vacated the district court's dismissal of petitioner's §2254 petition as untimely and remanded for further fact development on petitioner's allegation that the inadequacy of the prison law library constituted an impediment to filing within the meaning of §2244(d)(1)(B). After discussing *Egerton v. Cockrell*, 334 F.3d 433 (5th Cir. 2003), and *Whalem/Hunt v. Early*, 233 F.3d 1146 (9th Cir. 2000) (en banc), both of which held that an inadequate law library may satisfy §2244(d)(1)(B), the Seventh Circuit found that the inadequate record in this case rendered its own consideration of this basis for statutory tolling "premature."

TENTH CIRCUIT

***Fleming v. Evans*, ___F.3d___, 2007 WL 970163 (10th Cir. 2007).**

The Tenth Circuit vacated the district court's dismissal of petitioner's §2254 petition as untimely in this Oklahoma assault and battery case, and remanded for consideration of equitable tolling. Expressing agreement "with those circuits holding that sufficiently egregious misconduct on the part of a habeas petitioner's counsel may justify equitable tolling," the court found that petitioner "has alleged enough facts to warrant, at a minimum, an evidentiary hearing to determine whether he is entitled to equitable tolling." Petitioner's showing included the following: counsel was retained to prepare and file a post-conviction application "nearly a full year in advance of the expiration of the filing deadline," and petitioner's repeated inquiries of counsel yielded consistent - but false - assurances that a filing was imminent; and, notwithstanding counsel's assurances, petitioner prepared his own post-conviction application shortly before the filing deadline and sent it to his attorney for reformatting and filing, which counsel did not complete. In concluding that petitioner had established his entitlement to a COA on the timeliness question, the court also noted that "[t]he state bears the burden of proving that the AEDPA limitations period has expired."

ELEVENTH CIRCUIT

***Robbins v. Secretary for the Department of Corrections*, ___ F.3d ___, 2007 WL 968394 (11th Cir. 2007) (per curiam).**

The Eleventh Circuit held that, where a prisoner is resentenced following direct appeal, his judgment does not become final for purposes of §2244(d)(1)(A) until the time for challenging the resentencing on direct appeal expires, even where his subsequent habeas petition challenges only the conviction and not the resentencing. In reaching this conclusion, the court noted that "[t]he plain meaning of the statute forecloses" any other view, and that "the State now forthrightly acknowledges" this point.

considered lesser manslaughter charges before deciding to convict the defendant of capital murder.

OTHER STATES

SOUTH CAROLINA

***Ard v. Catoe*, 642 S.E.2d 590 (SC 2007).**

In this capital case, the South Carolina Supreme Court granted guilt phase relief finding that counsel was ineffective in failing to investigate and challenge the state's gunshot residue testimony. The defendant was convicted and sentenced to death for the murder of his pregnant girlfriend and their unborn child. There were no eye witnesses to the shooting and the defense team at trial presented the defense that the killing was accidental and that the gun was in his girlfriend's hands when it went off after he attempted to take it away from her. Prosecution experts discredited this theory by testifying that there was no gunshot residue on the victim's hands. The only expert hired by the defense to review this evidence was the former supervisor of the state's trial expert who was the witness' supervisor at the time he examined the evidence. Based upon this factual scenario, the court held that trial counsel was ineffective in not retaining an independent expert. In addition, counsel did not effectively cross-examine the state expert. It was revealed during post-conviction testimony that this additional evidence could have been elicited would have been consistent with the theory that the victim had handled a gun.

The court found that there was *Strickland* prejudice because of the emphasis the prosecutor placed on this evidence during argument and the fact that jury deliberations indicated that the jury seriously

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NOTEWORTHY NEWS

REHEARING GRANTED IN HERBERT SMULLS' CASE

As reported in our last newsletter, an Eighth Circuit panel granted habeas relief, by a 2-1 vote, to Herbert Smulls on a *Batson* claim. Unfortunately, we were recently informed that the Eighth Circuit has granted the state's petition for rehearing en banc. Given the ideological views of a vast majority of the active judges, this action does not bode well for Mr. Smulls' chances.

WEAVER CASE TO BE ARGUED ON MARCH 21, 2007

The Supreme Court has scheduled a March 21, 2007 oral argument date for the case involving Missouri death row inmate William Weaver. As reported in our last newsletter, the Court granted certiorari to address whether federal courts have the power under § 2254(d) to grant relief on due process challenges to improper prosecution arguments at the penalty phase of capital trials. Fortunately for Mr. Weaver, he has the assistance of several capable lawyers who have worked together as a team to help prepare the briefs in the case. In addition to his court-appointed attorneys, Phillip Horwitz and Eric Butts of St. Louis, John Blume, a noted habeas expert and Cornell University law professor, has agreed to argue the case. Mr. Weaver is also thankful that several members of Bryan, Cave, *et. al.* in St. Louis have agreed to assist in drafting the briefs. Let's keep our fingers crossed.

STATUTE OF LIMITATION UPDATE

There have been two developments that both capital and non-capital habeas practitioners need to know. First, the new Supreme Court decision in *Lawrence v. Florida*, which will be described in greater detail below, holds that in all habeas cases, the one-year statute of limitation is not tolled during the period that a petition for writ of certiorari is pending following the denial of state post-conviction review. However, on the bright side, the Court appears to affirm the view taken by the Eighth Circuit and many other courts that state post-conviction review is final on the date that the state's highest court issues its mandate. In Missouri, however, the Supreme Court does not issue formal mandates in capital cases. Thus, the statute of limitations will run from the time that rehearing is denied after opinion in capital cases. However, the language of the Supreme Court leaves open the possibility that in non-capital cases, the clock starts to run upon the denial of transfer in the Supreme Court, not the issuance of the mandate by the intermediate court of appeals. Thus, we would advise practitioners, in order to be better safe than sorry, to file their petitions in non-capital cases within one year of the denial of transfer.

Second, we have been informed that the Department of Justice has issued draft regulations regarding the opt-in provisions of the recently enacted Streamlined Procedures Act. These draft regulations are going through the administrative review process and, those in the know, suspect that the administrative review process will be completed within a few months. We would advise those of you who have a capital habeas case in which you have been appointed, but not yet filed a petition because the one-year period has yet to lapse, to contact us regularly to keep apprized of developments on this issue.

IN THIS ISSUE

<i>Noteworthy News..</i>	<i>1</i>
<i>U.S. Supreme Court.</i>	<i>2</i>
<i>Significant Decisions from the Eighth Circuit.</i>	<i>3</i>
<i>Significant Decisions from Other Circuits.</i>	<i>4</i>
<i>Significant Decisions from Other States.</i>	<i>5</i>

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

Uttecht v. Brown, 125 S.Ct. 1055 (2007).

In this Ninth Circuit capital habeas case, the Court granted certiorari on January 12, 2007 to address the following question: "Did Ninth Circuit err by not deferring to trial judge's observations and by not applying statutory presumption of correctness in ruling that state court decision to remove juror was contrary to clearly established federal law?"

Panetti v. Quarterman, 127 S.Ct. 852 (2007).

In this Fifth Circuit capital habeas case, the Court granted certiorari on January 3, 2007 to address the following question: "Does Eighth Amendment permit execution of death row inmate who has factual awareness of reason for his execution but who, because of severe mental illness, has delusional belief as to why state is executing him, and thus does not appreciate that his execution is intended to seek retribution for his capital crime?"

OPINIONS

Lawrence v. Florida, 127 S.Ct. 852 (2007).

In this capital habeas case from Florida, the Court, in a 5-4 decision authored by Justice Thomas, held that the one-year statute of limitations period of the AEDPA is not tolled during the period in which a prisoner petitions for cert. from the denial of state post-conviction review. The majority based its decision upon the plain language of § 2244(d)(2). In this regard, the Court relied on the statute's text which notes that the statute of limitation is tolled until the state post-conviction application "has received final resolution through the state's post-conviction procedures." The Court also relied upon exhaustion law principles from past cases holding that a cert. petition is not necessary to exhaust state remedies. The majority rejected Lawrence's argument that in the interest of consistency, this tolling provision should be construed to have the same meaning as the prior section which states that judgments become final by the conclusion of direct review, which includes certiorari review. The majority also brushed aside arguments by Lawrence that their

interpretation of the tolling provision would result in practical problems, such as requiring a prisoner to file his § 2254 before cert. has been denied on his state post-conviction action. Finally, the Court held that the circumstances in this case did not justify equitable tolling. The Court assumed, without deciding, that equitable tolling is allowed. However, to be entitled to equitable tolling, a petitioner must show that he has been diligent that some extraordinary circumstance stood in his way that prevented a timely filing. Under this standard, the Court rejected Lawrence's arguments based upon, among other things, confusion as to the state of the law regarding the statutory tolling provisions, his attorneys' miscalculation, and the delay by the state courts in appointing him state post-conviction counsel. The Court also rejected Lawrence's argument that his mental incapacity justified tolling because Lawrence made no factual showing of mental incapacity.

Burton v. Stewart, ___ S.Ct. ____, 2007 WL 43832 (2007).

The Court originally granted certiorari in this Washington rape, robbery and burglary case to consider whether *Blakely*, announced a new rule, and if so, whether it applied retroactively. After briefing and argument, however, the Court concluded that, because the petition in which the *Blakely* claim was raised was second or successive, and because petitioner had not secured leave to file it from the court of appeals, the judgment below denying relief on the merits was due to be vacated, and the petition dismissed for lack of jurisdiction.

Petitioner was originally convicted and sentenced in 1994. He was subsequently resentenced twice by the state courts, with the latest resentencing occurring in 1998. While state court review of the last resentencing proceeding was pending, petitioner sought federal habeas relief from his convictions, noting on his petition that a state court challenge to his sentence was ongoing. Later, and after his initial petition had been adjudicated by the federal courts, petitioner filed a second habeas petition, this time challenging the constitutionality of the 1998 resentencing judgment. The lower federal courts determined that this petition was not "second or successive" because petitioner had a "'legitimate excuse for failing to raise' his sentencing challenges in the 1998 petition," i.e., that they were unexhausted at the time the petition was filed. After assuming without deciding "that the Ninth Circuit's 'legitimate excuse' approach . . . is correct," the Supreme Court concluded that the finding "that Burton had a 'legitimate excuse' [in this case] is inconsistent

with the" practices the Court has prescribed. The Court explained:

There is no basis in our cases for supposing, as the Ninth Circuit did, that a petitioner with unexhausted claims . . . who elects to proceed to adjudication of his exhausted claims . . . may later assert that a subsequent petition is not "second or successive" precisely because his new claims were unexhausted at the time he filed his first petition. This reasoning conflicts with both [*Rose v. Lundy* and §2244(b) and would allow prisoners to file separate habeas petitions in the not uncommon situation where a conviction is upheld but a sentence is reversed. Such a result would be inconsistent with both the exhaustion requirement, with its purpose of reducing "piecemeal litigation," and AEDPA, with its goal of "streamlining federal habeas proceedings."

After further rejecting petitioner's efforts to analogize his case to *Stewart v. Martinez-Villareal* and *Slack v. McDaniel*, the Court addressed petitioner's contention that, had he waited for the state court litigation of his resentencing claims to conclude before bringing his first habeas petition, "he risked losing the opportunity to challenge his conviction in federal court due to AEDPA's 1-year statute of limitations." Finding that this argument "misreads AEDPA," the Court explained as follows:

[The Act] states that the limitations period applicable to "a person in custody pursuant to the judgment of a State court" shall run from, as relevant here, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." §2244(d)(1)(A). "Final judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212 (1937). Accordingly, Burton's limitations period did not begin until both his conviction and sentence "became final by the conclusion of direct review or the expiration of the time for seeking such review" - which occurred well after Burton filed his 1998 petition.

EIGHTH CIRCUIT DECISIONS

***Skillicorn v. Luebbers*, ___ F.3d ___, 2007 WL 328586 (8th Cir. 2007).**

In this Missouri capital habeas case, an Eighth Circuit panel unanimously affirmed the denial of habeas relief to Missouri death row inmate Dennis Skillicorn. The Court first rejected Skillicorn's argument that his due process rights under *Chambers v. Mississippi* were violated by the trial court's exclusion of his co-

defendant's confession, which indicated that the co-defendant alone killed the victim and that Skillicorn had no knowledge of the intent to kill beforehand. The Court rejected this claim, holding that the Missouri Supreme Court did not unreasonably apply *Chambers* based upon the state courts' determination that the co-defendant's statement was not against his penal interest because he was arguably attempting to minimize the fact that he deliberated on the murder in his statement. The Court also noted that the statement lacked corroboration. The Court also rejected Skillicorn's argument that his due process rights were violated by the exclusion of an expert witness in the penalty phase, due to a discovery violation. The Court held that there was no error of constitutional magnitude because the Missouri Supreme Court did not properly apply its evidentiary rules in excluding the evidence based upon a purported discovery violation. The Court also rejected all of Skillicorn's claims of ineffective assistance of counsel, including a challenge to trial counsel's failure to develop and present available mitigating evidence. In regard to the penalty phase ineffectiveness claim, the Court upheld the district court's decision finding insufficient *Strickland* prejudice in light of the other aggravating evidence presented, including the fact that Skillicorn had a prior murder conviction.

***Ringo v. Roper*, 472 F.3d 1001 (8th Cir. 2007).**

In this capital habeas case, the Court unanimously upheld the denial of habeas relief to Missouri death row inmate Earl Ringo. The Court first rejected Ringo's claim that his trial attorney was ineffective in failing to investigate and present evidence of Post-Traumatic Stress Disorder at both the guilt and penalty phases of trial. The Court noted that, in light of the fact that one of Ringo's trial experts made a preliminary finding of PTSD and suggested further evaluations to address it, it believed that a reasonable attorney might well have investigated this issue further. However, the Court felt that under the deferential standards of the AEDPA, they could not conclude that the state courts decided the *Strickland* performance question in an objectively unreasonable manner. The Court also noted, gratuitously, that Ringo would have great difficulty in establishing *Strickland* prejudice on this claim. The Court also rejected an ineffectiveness claim involving the failure to present the testimony of a child development specialist at the penalty phase. The Court upheld the Missouri Supreme Court decision that counsel made an informed strategic decision not to call this witness. Trial counsel based their decision on the view that this expert's testimony might conflict with and discredit the testimony of Ringo's mother. The

Court held that this decision was not an unreasonable application of the *Strickland* performance test.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

FIFTH CIRCUIT

***Nelson v. Quarterman*, 472 F.3d 287 (2006).**

This was a Texas capital case in which the Supreme Court had previously vacated and remanded an earlier panel opinion affirming the denial of relief for reconsideration in light of *Tennard v. Dretke*, 542 U.S. 274 (2004), and a panel had subsequently adhered to its earlier conclusion that the denial of relief should be affirmed. On rehearing en banc, a majority of the Fifth Circuit examined the Supreme Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), and its progeny, as well as the Fifth Circuit's own decisions interpreting and applying *Penry*, and concluded that "to the extent that past [Fifth Circuit] cases failed to account for the jury's ability to give effect to the impact of mitigating evidence on a defendant's moral culpability via the [Texas] special issues, those cases were based on an erroneous interpretation of Supreme Court precedent."

The majority began with a detailed discussion of the Supreme Court's decisions on Texas' capital sentencing scheme and the Eighth Amendment concerns arising out of the scheme's limitation of the jury's consideration to two "special issues," i.e., the deliberateness of the defendant's conduct, and the defendant's future dangerousness. Out of these decisions, the majority distilled several conclusions dictating the approach to be taken where a petitioner contends that the Texas special issues were inadequate to permit proper consideration of his mitigating evidence. First, the majority determined that jurors must be afforded a means of giving "full consideration and full effect" - as opposed to partial consideration or effect - "to the capital defendant's mitigating evidence." To satisfy this requirement, the sentencing procedure must have "allowed the jury to express its reasoned moral response to the defendant's mitigating evidence." And when determining whether the Texas procedure achieved these objectives in a particular case, the "standard . . . is whether there is a reasonable likelihood that the procedure precluded the jury from giving full consideration and full effect to the defendant's mitigating evidence." In conducting this inquiry, a

reviewing court is not permitted to speculate about whether the jury believed the mitigating propositions the defendant presented to it; rather, the "only question [a court] may ask regarding the jury's interpretation of the mitigating evidence presented at trial is simply whether the evidence is of such a character that it might serve as a basis for a sentence less than death." Finally, where the defendant's evidence was such that the special issues were reasonably likely to have prevented full consideration and effect, harmless error analysis is inapplicable because any such analysis would involve the "wholly inappropriate" enterprise of an "appellate court, in effect, . . . substitut[ing] its own moral judgment for the jury's . . .". The majority also concluded that all of these principles had been clearly established by the Supreme Court by the time petitioner's conviction became final in 1994.

Applying these principles to petitioner's *Penry* claim, the majority held that neither the deliberateness nor the future dangerousness special issue were sufficient to allow the jury to give full consideration and effect to petitioner's mitigating evidence. As to the former, the majority reasoned that, "[a]s the Supreme Court observed in *Penry I*, a reasonable juror could have concluded that, while the murder was deliberate, Nelson was less morally culpable as a result of his borderline personality disorder and abusive childhood than a murderer without such a mental illness and similar upbringing might have been." Thus, "although the jury may have been able to give partial effect to this evidence through the deliberateness special issue, there is a reasonable likelihood that it was unable to give full effect to this evidence, because it had relevance beyond whether Nelson acted deliberately." As to the second special issue, the majority found that the jury could have "given some effect" to petitioner's evidence of borderline personality disorder, but only if it concluded that the illness was treatable. On the other hand, if the jury found that the illness was not treatable, "it would necessarily have [had] to answer 'yes' to the special issue." "Consequently," the majority continued, "there would be no vehicle to give mitigating effect to [petitioner's] evidence of borderline personality disorder, i.e., no way for the jury to express its conclusion that even though he is likely to be dangerous in the future, his mental illness makes him unworthy of the death penalty." The state court's failure to recognize and remedy these deficiencies, the majority concluded, involved an unreasonable application of the Supreme Court's cases.

SIXTH CIRCUIT

***Eddleman v. McKee*, 471 F.3d 576 (6th Cir. 2006).**

In this Michigan second degree murder and firearm case, the Sixth Circuit held that "when a state court has found an error to be harmless, we should ask on collateral review whether the state court's harmless-error decision was contrary to, or an unreasonable application of, the clearly established federal rule that a trial error is harmless only if it is harmless beyond a reasonable doubt." After explaining that it had been on one side of a 3 to 3 circuit split by taking the view that "AEDPA supplements *Brecht*" rather than supersedes it, the Sixth Circuit reconsidered its position "in light of *Mitchell v. Esparza*, [540 U.S. 12, 17-18 (2003) (*per curiam*),] which strongly implied that courts should apply only the *Chapman* plus AEDPA deference standard of review." Noting that "[t]wo circuits, the Second and the Seventh, already have relied on *Esparza* to revisit their prior precedents and adopt the standard of *Chapman* plus AEDPA deference," the Sixth Circuit joined them by declaring that "AEDPA replaced the *Brecht* standard with the standard of *Chapman* plus AEDPA deference when, as here, a state court made a harmless-error determination." The court went on to explain that "[t]his result makes practical sense for two reasons." First, because *Brecht* was a court-made rule designed to lessen "the harm caused by *de novo* collateral review of state court harmless-error determinations," and "[w]hen Congress enacted AEDPA, it obviated the need for such a stopgap." Second, where a state court finds constitutional error but deems it harmless, federal courts "owe deference primarily to the state court's harmless-error determination rather than to the final outcome the state court reached," and the "*Chapman* plus AEDPA deference [standard] provides this type of deference . . . to the final outcome the state court reached" when that court fails to find constitutional error in the first instance.

Applying its newly adopted approach to the state court's finding that the admission of petitioner's coerced confession was harmless under *Chapman*, the Sixth Circuit affirmed the district court's grant of relief. The court began by determining that *Arizona v. Fulminante* "represents the best available explication of the 'clearly established Federal law . . . ' relevant to Eddleman's claim," and went on to find that, "[c]onsidering the [f]ive indicia of reasonableness [relied upon by the Court in *Fulminante*,] we see a strong congruence between [this] case and *Fulminante*." The court explained:

Regarding the strength of the government's case, the prosecutions in Eddleman's case and in *Fulminante* both rested solely on the testimony of

questionably credible witnesses. As in *Fulminante*, no physical evidence linked Eddleman to the crime. As in *Fulminante*, the key prosecution witnesses against Eddleman told inconsistent or unbelievable stories[.] . . . And as in *Fulminante*, those witnesses all had reasons to implicate Eddleman other than a commitment to telling the truth[.] . . .

The court explained further that the state court had "sidestepped these persistent similarities by focusing solely on the number of witnesses implicating" petitioner, and that *Fulminante* "rejected such a formalistic classification of the type and quantity of evidence . . ." After adding that the jury in petitioner's case deadlocked twice before convicting him, the Sixth Circuit concluded that because "the circumstances of Eddleman's case parallel the circumstances of *Fulminante*," and given that "[n]o other case-specific factors dictate that the two cases should come out differently," "the Michigan Court of Appeals's harmless-error decision was an unreasonable application of clearly established federal law, as determined by the Supreme Court's decisions in *Chapman* and *Fulminante*."

***Davis v. Coyle*, ___ F.3d ___, 2007 WL 208521 (6th Cir. 2007).**

A Sixth Circuit panel reversed the district court's denial of relief in this Ohio capital case, holding that, upon Davis' re-sentencing after a successful direct appeal, the Ohio trial court (in this case, a three-judge panel) violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments when it excluded evidence of his good behavior on death row between his 1984 sentencing hearing and his 1988 re-sentencing hearing.

In Davis' case, the trial court precluded him from presenting witnesses at his re-sentencing hearing, despite the prosecutor's suggestion that their testimony should be considered. These witnesses -- the psychologist who testified at the first sentencing hearing, two prison officials, and a social worker -- would have testified as to his adaptation to and good behavior on death row. Defense counsel proffered their anticipated testimony on the record. At closing argument the prosecutor urged that Davis be re-sentenced to death, in part, on the non-statutory aggravating factor of future dangerousness. In response, defense counsel could rely only on the the mitigation and Skipper evidence presented at the first sentencing hearing. The state trial court re-sentenced Davis to death.

The crux of the state supreme court decision at issue was that Davis' proffered evidence regarded events that occurred post-trial -- and while Skipper permitted evidence of good behavior in prison before

trial, it did not permit such evidence of events occurring post-trial. However, the Sixth Circuit held that “[a]lthough there could conceivably be some question about the relevance of such [excluded] evidence, the record in this case establishes without a doubt that it was highly relevant to the single aggravating factor relied upon by the state – that future dangerousness should keep Davis on death row.” It had “no choice but to conclude that the Ohio Supreme Court’s decision to exclude the proffered testimony, based on the court’s belief that the facts of Davis’s [sic] case could be distinguished from Skipper’s solely on the basis of timing, was both an unreasonable application of the decision in Skipper and contrary to the holding in that opinion and its antecedent cases.”

The Court was further persuaded of the correctness of its decision by the recent Supreme Court decision in *Ayers v Belmontes*, 127 S.Ct. 469 (2006) (holding that likelihood of future good conduct may tend to make a defendant less deserving of the death penalty). Additionally, it pointed to 9th and 11th Circuit opinions holding that trial courts must consider, on re-sentencing, any new mitigating evidence developed. Also, it rejected the Warden’s argument that the reweighing -- subsequent to the re-sentencing -- of aggravating and mitigating evidence cured any error: simply put, defense counsel’s proffer of the improperly excluded evidence did not constitute actual, live presentation of that evidence.

The court went on to address other sentencing arguments raised by Davis, realizing that they might reoccur at the next re-sentencing hearing. First, it rejected Davis’ argument that the state courts’ interpretation of a state statute precluding re-sentencing to death in certain situations to constitute a preclusion only when the defendant was tried by a jury – as opposed to Davis, who was tried by a three-judge panel – did not violate due process under *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Second, it discussed Davis’ argument that, upon the state courts’ original grant of a re-sentencing hearing, he should have been allowed to withdraw his jury waiver. Davis argued that his waiver was involuntary, on the basis that it was made as a result of the trial court’s denial of his motion to sever the murder charge from the felon-in-possession charge; he also argued that the waiver was not knowing and intelligent, as the state supreme court decision interpreting the statute mentioned above occurred after his jury waiver. The court rejected these arguments, noting that Davis’ fundamental right to have a jury determine punishment, under *Ring v. Arizona*, 536 U.S. 584 (2002), had not “yet been implicated in this matter.”

Anticipating arguments to be made upon its grant of a second re-sentencing hearing, the Sixth Circuit thought that “there is a legitimate question as to whether a criminal defendant should be held to a jury waiver entered almost 25 years before his newly-mandated sentencing hearing,” It advised that an Ohio state court decision holding that a jury waiver is inherently revoked when a defendant’s conviction is revoked “should certainly inform the sentencing court’s determination of the viability of Davis’ jury waiver on remand.”

The concurring judge agreed with the grant of a new sentencing hearing only on the basis that the prosecutor’s argument at the re-sentencing urging the court to discount Davis’ previously presented prison record triggered Davis’ due process right under *Garnder v. Florida*, 430 U.S. 349 (1977), to present rebuttal evidence.

SIGNIFICANT DECISIONS FROM OTHER STATES

MARYLAND

***Evans v. State*, 914 A.2d 25 (Md. App. 2006).**

The Maryland Court of Appeals declared the state’s lethal injection protocol invalid because the protocol was not adopted in accordance with Maryland’s Administrative Procedure Act or exempted from the Act’s requirements by the state legislature. The Court granted injunctive relief, after finding that the execution protocol is not exempt from the Maryland Administrative Procedure Act, rejecting the argument that the protocol is not actually a set of administrative regulations, but involves, instead, an internal management decision of the department of corrections.

SOUTH CAROLINA

***State v. Burkhardt*, ___ S.E.2d ___, 2007 WL 80036 (S.C. 2007).**

In this capital case, the South Carolina Supreme Court reversed a death sentence, finding that the prosecutor improperly presented evidence at the penalty phase regarding certain privileges that the state's prisoners receive if they are sentenced to life

without parole, including access to the yard, education, recreation, television, and visitors. The Court held that this evidence ran afoul a state statute forbidding the imposition of the death penalty on the basis of an arbitrary factor because it is irrelevant to the character of the defendant or the circumstances of the crime.

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