The PUBLIC INTEREST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE©

March - April 2008

NOTEWORTHY NEWS

NO NEWS IS GOOD NEWS

We are happy to report there are no new developments on the opt-in regulations since we issued our last newsletter. Everyone is still waiting for the regulations to be published and then go to the OMB for review. It is not expected that this will happen before April. We will keep you posted of further developments.

A WORD OF WARNING

As most of you know, the oral argument in *Baze*, the lethal injection challenge, did not go well for our side. Most experts expect an adverse decision to be issued withing the next month or two. For those of you representing one of the many Missouri death row inmates who has already exhausted his normal appeals, we strongly suggest you make contingency plans to try to forestall the likely flurry of execution warrants that will follow an adverse decision in *Baze*.

MISSOURI SUPREME COURT REJECTS ERNEST JOHNSON'S MENTAL RETARDATION CLAIM

By a 4-3 vote, the Missouri Supreme Court upheld a jury verdict, after remand, finding that Earnest Johnson is not mentally retarded. The majority and dissenting opinions focused on the appropriate burden of proof. A more detailed summary of the decision is outlined in the Missouri Supreme Court section below.

THE END OF AN ERA

On March 31, 2008, our long-time office manager, Ethel Gurke, will retire. Ethel has been with us since the old Resource Center days and was instrumental in keeping us afloat the last decade after we reorganized as a not-for-profit law firm. She will be sorely missed. Below is a brief essay that Ethel authored regarding her time at PILC.

"THANKS FOR THE MEMORIES"

Since July 11, 1994, I've had the opportunity to work for the Missouri Capital Punishment Resource Center/Public Interest Litigation Clinic. During this period, I've had an education that cannot be compared to anything any college or university could offer. I've had the chance to meet a lot of really good people, work with a lot of really good people, and offer assistance to the next group of up and coming really good folks by notarizing a lot of bar applications and watching some of them go into this most difficult line of appellate work.

It was rewarding to have the chance to tell Oren Edgman his out date (and then finally get to meet him last year), be around when Heath Wilkins was resentenced, meet Ellen Reasonover, celebrate with Steve Manning the day he was released, work with Joe Amrine, give Ted White a hug when he was finally found not guilty and released, meet and see Howard Verweire get released the day before Christmas, get acquainted with Dennis Fritz, and talk to many other incarcerated men and women who, I hope, by just

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visiting with them over the phone for a minute or two, help make their lives a little better at that particular point in time.

As of March 31, 2008, I will retire from PILC and start my new position as a full-time daughter, sister(-in-law), mother(-in-law), grandmother, and spoil two beautiful great-granddaughters. The time may come when I become bored and want to work again, maybe part-time or help out during vacations or position vacancies, and if that urge should arise -- but I'll let you know if or when that might happen!

Ethel Gurke, ALS

U.S. SUPREME COURT RECENT DECISIONS

CERT GRANTED

Kennedy v. Louisiana, No. 07-343

In this Louisiana capital case, the court granted cert to address the following questions: (1) Does Eighth Amendment's cruel and unusual punishment clause permit state to punish crime of rape of child with death penalty? (2) If so, does Louisiana's capital rape statute violate the Eighth Amendment in so far as it genuinely fails to narrow class of such offenders eligible for death penalty?

OPINIONS

***Danforth v. Minnesota*, __ U.S. __ (2008) 2008 WL 441059**

By a 7-2 vote, the Court held that state courts are not bound to follow the retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989) in determining whether to retroactively apply new constitutional rules to convictions that were final before the new decision issued. The Minnesota Supreme Court had refused to grant Danforth a new trial based upon a confrontation violation under *Crawford v. Washington*, holding that it was bound to follow the United States Supreme Court's recent decision that *Crawford* is not retroactively applicable under *Teague*. The majority, in an opinion authored by Justice Stevens, held that *Teague* did not constraint the state's authority to provide remedies for a broader range of constitutional violations than can be readdressed in federal habeas proceedings. *Teague* was limited to the federal habeas context, which implicated federalism concerns regarding a federal court's power to overturn state court convictions. *Teague* was an exercise of a court's federal statutory power to limit habeas corpus review. Any federal interest in uniformity decisions did not outweigh the state courts' independent sovereignty to deal with the enforcement of their own laws as long as their decisions do not infringe upon federal constitutional rights. As a result, nothing in *Teague* or in any other federal law source prohibits the states from giving broader retroactive effect to new rules of criminal procedure. Justice Roberts, joined by Justice Kennedy, dissented. One interesting issue brought up in this dissent, involving a question that the majority did not address, would be whether it would be permissible for state courts to apply a retroactivity standard that is more unfavorable to prisoners than the rule announced in *Teague*. This issue must be left for another day.

***Wright v. Van Patten*, 128 S.Ct. 743 (2008) (per curiam)**

After the Supreme Court vacated the Seventh Circuit's earlier grant of relief and remanded for reconsideration in light of Carey v. Musladin, 127 S.Ct. 649 (2006), the Seventh Circuit adhered to its conclusion that relief was required. The Supreme Court again granted certiorari, and this time reversed. Respondent's claim was that his Sixth Amendment right to counsel had been violated as a result of his attorney's participation in his Wisconsin guilty plea hearing via speaker phone. While the state courts rejected respondent's claim for failure to satisfy Stirckland v. Washington, the Seventh Circuit held that respondent's claim should have been assessed under United States v. Cronic, which permits a presumption of prejudice where a defendant has been denied counsel, rather than under the more demanding Strickland standard.

The Supreme Court disagreed. After explaining that Strickland "ordinarily applies to claims of ineffective assistance of counsel at the plea hearing stage," and that "it was in a different context that Cronic 'recognized a narrow exception ...,'" the Court observed as follows:

No decision of this Court ... squarely addresses the issue in this case ... or clearly establishes that Cronic should replace Strickland in this novel factual context. Our precedents do not clearly hold that counsel's participation by speaker phone should be treated as a "complete denial of counsel," on par with total absence. ... The question is not whether counsel in those circumstances will perform less well than he otherwise would, but whether the circumstances are likely to result in such poor performance that an inquiry into its effects would not be worth the time. ... Our cases

provide no categorical answer to this question ... ¶ Because our cases give no clear answer to the question presented, let alone one in Van Patten's favor, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' " Under the explicit terms of §2254(d)(1), therefore, relief is unauthorized.

MISSOURI SUPREME COURT DECISIONS

***State v. Johnson*, ___ S.W. 3d ___, 2008 WL 131995 (Mo. banc 2008)**

After his fourth penalty phase proceeding, a jury rejected Earnest Johnson's claim of mental retardation and sentenced him to death. On appeal, the court, by a 4-3 vote, affirmed the jury's finding that Johnson was not mentally retarded. The majority, in an opinion by Judge Russell, initially held that the court did not err in instructing the jury that Johnson bore the burden of proof to establish his mental retardation by a preponderance of the evidence. The majority based this determination upon language from the state M.R. statute that implies the burden of proof should be on the defendant that states that a sentence of life shall be imposed "if trier of fact finds by a preponderance of the evidence that the defendant is mentally retarded." The majority also rejected Johnson's argument that *Ring v. Arizona* requires the state to prove that a defendant is not mentally retarded beyond a reasonable doubt. Under the Missouri statutory scheme, a finding of mental retardation is not a finding of fact that increases the potential range of punishment. Instead, it is a finding that removes the defendant from consideration of the death penalty. In addressing the merits of the M.R. finding, the court held, that in light of conflicting evidence, the evidence was sufficient to support the jury's verdict. In this regard, the court noted that Johnson's IQ scores over the years ranged between 67 and 95. The majority also rejected all of Johnson's other claims of error, including a proportionality argument.

Judge Wolff, joined by Judges Stith and Teitelman, dissented. The dissent focused on the appropriate burden of proof, noting that the statute was ambiguous on this point. Therefore, *Atkins* left the issue of the appropriate burden of proof to the states to decide. Because the statute is ambiguous, Judge Wolff believed that the rule of lenity required the state to prove mental retardation beyond a reasonable doubt. Judge Wolff also believed that the majority's opinion was inconsistent with *Ring*.

Finally, it should be noted that Judge Breckenridge did not participate in this decision. The deciding vote was cast by Judge Barney, from the Court of Appeals, Southern District, who was hearing the case as a special judge.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

SIXTH CIRCUIT

***In re: McDonald*, __ F.3d __, 2008 WL 89951 (6th Cir. Jan. 10, 2008)**

The Sixth Circuit granted leave to file a second or successive petition in this non-capital Ohio murder case. Petitioner based his request on two affidavits signed more than two years after his initial federal habeas petition was denied. The first affidavit was from a key prosecution witness who stated that, prior to trial, she had been coerced into recanting her previous alibi testimony favoring petitioner by the prosecutor, who had also coerced her into having nonconsensual sex with him. The second affidavit was from the prosecutor's brother, who corroborated the first affiant's story about the prosecutor having coerced her into having sexual relations. Applying §2244(b)(2)(B), the Sixth Circuit found that petitioner had made a sufficient prima facie showing of constitutional error, previous unavailability through due diligence, and probability of acquittal to warrant authorization to proceed.

Before concluding that petitioner was entitled to leave to file a second petition, the Sixth Circuit rejected the state's contention that his application should be rejected because the proposed petition would be untimely. Finding that questions such as timeliness were not proper considerations for a court of appeals acting as gatekeeper, the Sixth Circuit explained as follows:

The government's arguments ... do not take the entire text of 28 U.S.C. §2244(b) into account. Section 2244(b)(3)(C) requires the relevant court of appeals to ensure that the petitioner's request for permission to file a second habeas corpus petition "satisfies the requirements of this subsection." (emphasis added). In contrast, 28 U.S.C. § 2244(b)(4) charges the district court, and not the court of appeals, to "dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section." (emphasis added). Thus, investigating compliance with the one-year statute of limitations outlined in 28 U.S.C. §2244(d) - clearly a separate subsection from 28 U.S.C. §2244(b) - is not within the purview of the court of appeals' consideration of applications requesting authorization to file a second or successive habeas corpus petition pursuant to 28 U.S.C. §2244(b).

The court went on to add that this approach is supported by "logic," since courts of appeals acting as gatekeepers ordinarily lack the full record necessary to determine matters such as a petitioner's entitlement to equitable tolling. ("For similar reasons, this court need not consider at this stage whether the petitioner's claims have been exhausted").

NINTH CIRCUIT

***Smith v. Baldwin*, 510 F.3d 1127 (9th Cir. 2007) (en banc)**

Having previously vacated a panel's decision holding that petitioner could pass through the Schlup v. Delo "actual innocence" gateway and obtain merits review of his claims, the en banc Ninth Circuit held that petitioner could not, in fact, satisfy Schlup. Petitioner pled no contest to a felony murder which occurred during his admitted participation, with a co-defendant, in a burglary, and his theory for satisfying Schlup was that evidence discovered since his plea established an affirmative defense to felony murder under state law. While the court ultimately rejected petitioner's claim of entitlement to merits review, it did accept his assertion that Schlup could be satisfied by proof "that it is more likely than not that no reasonable juror would have found that he failed to establish any of the five elements of the affirmative defense by a preponderance of the evidence."

***Bradley v. Henry*, 510 F.3d 1093 (9th Cir. 2007) (en banc)**

Concurring in a broader judgment reversing the denial of relief authored by Judge Noonan and joined by four other judges, Judge Clifton, joined by three other judges, established the ground on which relief would be granted. After a series of delays spanning nearly three years following her arrest for felony murder, most of which were not attributable to petitioner, she moved to substitute retained counsel for the attorney previously appointed by the court. The motion was heard 46 days before the scheduled trial date, and retained counsel appeared and assured the court both that he intended to be ready for trial without further delay, and that there were no financial concerns that would jeopardize his ability to see the case through. These assurances notwithstanding, the trial court expressed concern about the possibility of delay and financial trouble and denied the request to substitute counsel.

Relying on Caplin & Drysdale Chartered v. United States, 491 U.S. 617 (1989), Judge Clifton concluded that the state courts acted contrary to, or unreasonably applied,. the clearly established law entitling petitioner to representation by her counsel of choice in three respects. First, while past events in the case gave the trial court reason to be concerned about possible financial trouble, the court failed to inquire about the financial arrangements with the attorney petitioner had retained, and apparently failed to consider either that any future motion to withdraw could be denied or that the attorney could be told that he would be bound by his commitment to the case and asked whether he was nevertheless willing to proceed. "Having failed to explore the subject seriously," Judge Clifton explained, "let alone to make a record demonstrating a realistic possibility that financial concerns would lead [counsel] to move to withdraw in the future, it was unreasonable for the court simply to deny Bradley her right to retained counsel of her choice instead." Second, while the state court of appeals upheld the trial court's ruling, in part, on the ground that it was possible petitioner could create additional delay by suing retained counsel to generate a conflict of interest, there was nothing in the record indicating either that the government had attempted to meet its burden of proving the existence of such a danger, or that the trial court had actually considered such a danger as part of its own ruling. "As the issue was neither raised before nor addressed by the trial court, the California Court of Appeal's conclusion that the potential for a conflict of interest supported the trial court's denial of Bradley's motion for substitution was contrary to clearly established Supreme Court precedent." Third, both state courts relied on the possibility that a change in counsel would result in further delay without a valid basis for doing so, and in the face of counsel's assertions at the substitution hearing and in a sworn declaration that he would be ready by the scheduled trial date. Noting the state appellate court's reliance on "potentially equivocal language" in counsel's statements to the trial, Judge Clifton observed as follows: "Lawyers are trained to be cautious. It is not a surprise that [counsel] might not want to waive all contingencies unless pressed to do so. For all he knew, he might have a heart attack or be run over by a bus before the trial date. But no fair reading of [his] declaration or his statements at the hearing could support a conclusion that he was laying the groundwork for a future request to continue the trial ..." Judge Clifton went on to conclude that "it was unreasonable for the court simply to deny the substitution motion ... out of fear that something might happen to delay the trial," and that the state courts' denial of the motion without "any valid justification .. was contrary to clearly established Supreme Court precedent." 2007 WL 4410355 at *10.

Finally, having concluded that the state court's rejection of petitioner's request to proceed with counsel of her choice was both wrong and defective under §2254(d), Judge Clifton turned to the state's contention that United States v. Gonzalez-Lopez,126 S.Ct. 2557 (2006) (erroneous deprivation of right to counsel of choice is structural error) was inapplicable because it was announced after the state court decisions in

petitioner's case. Rejecting the state's contention, Judge Clifton reasoned that the state appellate court "found no constitutional violation and therefore never reached the issue of whether the violation was subject to review for harmlessness. Accordingly, Gonzalez-Lopez has no bearing on whether its decision was erroneous. Rather, Gonzalez-Lopez guides us in determining the consequences of the erroneous state decision. In this case, it requires reversal of Bradley's conviction."

SIGNIFICANT DECISIONS FROM OTHER STATES

NEBRASKA

***State v. Mata,* ___ N.W.2d. ___, 2008 WL 351695 (Ne. Feb. 8, 2008)**

The Nebraska Supreme Court issued a decision, by a 6-1 vote, that execution by electric chair constitutes cruel and unusual punishment under a state constitutional standard that is identical to the Eighth Amendment standard. The court rejected the state's argument that no Eighth Amendment violation can occurunless unnecessary pain is intentionally inflicted. Unlike the lethal injection case, there is more than a risk of unnecessary pain. The court cited "abundant evidence that prisoners sometimes will retain enough brain functioning to consciously suffer the torture, high-voltage electric current inflicts on a human body." The court also held that electrocution's proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man. Under the evolving standard of decency test, the court found it significant that Nebraska was the last state to retain electrocution as a method of capital punishment. In light of its decision, the court stayed Mata's execution until the state comes up with another method of carrying-out death sentences.

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