THE PUBLIC INTERST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE

July - October 2008

NOTEWORTHY NEWS

MISSOURI LETHAL INJECTION UPDATE

There remain fourteen death-sentenced prisoners against whom the attorney general has asked the Missouri Supreme Court to schedule an execution date, with most of these requests dating back to June 2007. As of this writing, however, no executions are scheduled. Dates have previously been set for John Middleton and Dennis Skillicorn, but neither will be executed until the court resolves a pending challenge to the Department of Corrections' lethal injection protocol. That challenge, brought under the Missouri Administrative Procedure Act, asserts that the protocol is an administrative "rule" which required notice to the public and input from citizens as part of the rule's enactment. The Supreme Court took oral argument in the case October 7, and a ruling could issue at any time. (No. SC 89571, *Middleton, et al. v. Missouri Dept. of Corrections, et al.*). Meanwhile, the Court vacated an August execution date previously set for Dennis Skillicorn, in light of the DOC's interference with counsel's attempts to interview prison staff and inmates in support of Mr. Skillicorn's clemency petition. Finally, several Missouri inmates continue to fight the State's execution method on Eighth Amendment grounds, arguing that the DOC's historically inadequate vetting of medical personnel -- including its use of the dyslexic and otherwise incompetent "Dr. Doe" -- creates the risk that inmates will suffer excruciating pain if the State's elaborate protocol is not carried out exactly as written. Dr. Doe himself acknowledged as much when speaking with a reporter for the Associated Press. Describing the state's new protocol, he said, "It will have the same effect, the guy will die. But it may not be pretty." Federal District Judge Fernando J. Gaitan dismissed the prisoners' action in July, and the matter is now being briefed in the Eighth Circuit (No. 08-2895, *Clemons et al. v. Crawford et al.*).

THIS TOO SHALL PASS: COURTS TURN A BLIND EYE TO BATSON VIOLATIONS IN ST. LOUIS COUNTY

This issue features a number of cases in which reviewing courts have upheld St. Louis County's quest to remain an "equal protection-free" zone. Sitting en banc, the Eighth Circuit upheld the denial of habeas relief to Herbert Smulls, despite the trial judge's incomplete and incoherent findings on counsel's *Batson* objection; the recent Supreme Court case of *Snyder v. Louisiana*, which underscored the importance of actual findings by the actual trial judge; and the refusal of Smulls' judge to acknowledge that a stricken juror was, in fact, black: "I don't know what constitutes black. Years ago they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people." *Smulls v. Roper*, 535 F.3d 853 (8th Cir. 2008). Judge Bye's elucidating dissent may enhance the prospect of review by the U.S. Supreme Court. Similarly, in *Barnett v. Roper*, 541 F.3d 804 (8th Cir. 2008), the court turned back a claim that the prosecutor struck a veniremember because of her gender. The prosecutor expressly acknowledged that he struck the veniremember because she is "a very young female who is single." Likewise, the Missouri Supreme Court rejected a claim that counsel was ineffective for not objecting under *Batson* when a St. Louis County prosecutor struck a veniremember for being "religious," regardless of what his religion believes about the death penalty. *See Strong v. State*, --- S.W.3d ---, No. SC 88311, 2008 WL 2929675 (Mo. banc July 31, 2008). It should be noted that St. Louis County's prosecutors have been held to violate *Batson* in no fewer than seven separate cases, including two different trials of inmate Vincent McFadden. *See State v. McFadden*, 216 S.W.3d 673 (Mo. banc 2007); *State v. McFadden*, 191 S.W.3d 648 (Mo. banc 2006). We at PILC remain confident that courts will come to scrutinize the illegal practices of the St. Louis County's prosecutors, so long as capital counsel continue to bring those practices to light.

PROSECUTORIAL DISCRETION YIELDS ARBITRARY OUTCOMES

The *St. Louis Post-Dispatch* examined the disparate charging and death-seeking practices of the prosecutors' offices in St. Louis City and St. Louis County. *See*

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"Prosecutors Use Discretion Differently in Death Sentencing" (July 6, 2008). The article confirmed that the neighboring jurisdictions fit a nationwide trend: "Urban prosecutors are less likely than their suburban or rural counterparts to go after the ultimate punishment." St. Louis County usually has about one-fourth as many murders as St. Louis City in a given year. Nevertheless, the City has not seen a death sentence since Martin Link's trial in 1995, whereas the County has imposed ten death sentences in the last eight years. The article contrasted the case of Kevin Johnson, who was convicted of killing a police officer in St. Louis County and sentenced to death, and Harold Richardson, who was allowed to plead guilty in exchange for a life sentence for killing a police officer in St. Louis City. Richard Dieter, executive director of the Death Penalty Information Center, questions the system's fairness. "In a lot of places, it makes a difference if you commit a murder on this side of the county line or the other. It seems unfair."

REPORT CONFIRMS THAT BETTER-FUNDED DEFENSES RESULT IN FEWER DEATH VERDICTS IN FEDERAL PROSECUTIONS

The Spencer Report on the Cost, Quality and Availability of Defense Representation in Federal Death Penalty Cases, commissioned by the Defender Services Office of the Administrative Office of the U.S. Courts, has helpfully documented what capital trial counsel have long known: defendants are less likely to receive the death penalty when the court approves and spends greater sums of money for appointed counsel and defense experts. The study is based on cases started and completed between 1998 and 2004. Median total case costs for that period were about $465,000. The most telling finding is this: those defendants who received less than $320,000 in combined attorney and expert assistance were sentenced to death in 44 percent of cases, compared to only 19 percent of cases for defendants receiving above $320,000 in assistance. Defendants in the "low-cost" group, then, were more than twice as likely to be sentenced to death. These findings have particular salience in our neck of the woods. Eight of the fifty-seven inmates on the federal death row were tried and sentenced in Missouri, including five in Kansas City before judges not known for their generosity in approving fees and expenses.

NEW BALDUS STUDY REVEALS RACIAL BIAS IN ARKANSAS DEATH PENALTY

A study by Professor David Baldus -- the same individual who studied Georgia's death penalty in the infamous case of *McCleskey v. Kemp*, 481 U.S. 279 (1987) -- reveals marked racial patterns in capital cases in Lafayette and Miller Counties in southwestern Arkansas, over the course of sixty-six death-eligible homicide cases from 1990 through 2005. The study revealed that black defendants who kill white victims were uniquely likely to be charged with capital murder and sentenced to death – even controlling for other variables such as the severity of the crime or the defendant's criminal history. Blacks were the defendants in 58 percent of the death-eligible cases studied, but represented 90 percent of the defendants against whom prosecutors sought death. Whites were the victims in 53 percent of the death-eligible cases, compared to 70 percent of the cases in which death was sought. In the district studied by Professor Baldus, there was not a single white defendant or a single killer of a black person who was sentenced to death. "The disparities are not normally as stark as this," Baldus explained.

ARKANSAS PAROLE BOARD RECOMMENDS CLEMENCY FOR FRANK WILLIAMS

The Baldus study, above, was commissioned by the Federal Public Defender of Arkansas, which represents condemned inmate Frank Williams, who was convicted and sentenced in Lafayette County for the murder of his white employer. The Federal PD included the study within the materials it submitted to the Arkansas Parole Board in support of Mr. Williams' application for executive clemency, in addition to substantial evidence that Mr. Williams is mentally retarded. The Parole Board voted 4-3 in favor of commuting Mr. Williams' sentence to life imprisonment, but Arkansas Governor Mike Beebe has not yet acted on the Board's recommendation. Frank Williams is a former client of the PILC, which extends its sincere thanks to the Federal Public Defender for its untiring efforts. As of this writing, Mr. Williams' death sentence is hold while the Arkansas Supreme Court considers whether the state legally enacted an execution protocol without formally and publicly promulgating a regulation under Arkansas' Administrative Procedure Act.

MITIGATION GUIDELINES DEVELOPED TO SUPPLEMENT ABA GUIDELINES

The "Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases," have now been published in the Spring 2008 edition of the *Hofstra Law Review* and are available online at http://law.hofstra.edu/academics/Journals/LawReview/lrv_issues_v36n03.html. The Supplementary Guidelines were developed in cooperation with the American Bar Association and through the extensive review and input of experts in the field of death penalty litigation. The Supplementary Guidelines essentially "flesh out" the 2003 ABA Guidelines in order to provide more precise guidance to defense teams, trial and appellate courts, as well as appointing authorities. Under a grant from the Butler Family Foundation, PILC attorneys Jennifer Merrigan and Sean O'Brien played a substantial role in the developing the Supplementary Guidelines. Among

other things, Ms. Merrigan and Mr. O'Brien surveyed the prevailing practices of death penalty jurisdictions, suggested particular levels of resources and professional qualifications to be provided a defense team, and have been outspoken advocates for broad acceptance and implementation of the Supplementary Guidelines.

JUDGE ZEL FISCHER APPOINTED TO THE MISSOURI SUPREME COURT

On October 15, 2008, Governor Matt Blunt selected Associate Circuit Judge Zel Fischer to fill the Missouri Supreme Court vacancy created by Judge Stephen N. Limbaugh's appointment to the federal bench. Judge Fischer, a Republican, has served as an elected Associated Circuit Judge in Atchison County. Governor Blunt selected Fischer from among a pool of three candidates proposed by the Appellate Judicial Commission. The other two finalists were Judges Lisa White Hardwick and Ronald Holliger from the Western District Court of Appeals.

US SUPREME COURT RECENT DECISIONS

CERT GRANTED

Harbison v. Bell, 128 S. Ct. 2959 (2008). In this case the court granted certiorari to consider "[w]hether the Terrorist Death Penalty Enhancement Act of 2005 [as codified at 18 U.S.C. § 3599(e)] provides prisoners sentenced under state law the right to federally appointed and funded counsel to pursue clemency under state law, and whether a district court's denial of such a request may be appealed without a certificate of appealability."

REHEARING DENIED

Notwithstanding the court's post-opinion discovery that military law permits the death penalty in cases of child rape, the court denied rehearing and abided by its holding in Kennedy v. Louisiana, 128 S. Ct. 2641 (2008), that the death penalty is cruel and unusual punishment for the crime of raping a child. The denial of rehearing was not without significant animosity among the court's members. See Kennedy v. Louisiana, --- S. Ct. ---, No. 07-343, 2008 WL 4414670 (Oct. 1, 2008) (Statements of Kennedy, J., and Scalia, J., respecting the denial of rehearing).

CERT DENIED

Walker v. Georgia, --- S. Ct. ---, No. 08-5385. The court denied certiorari without comment in this Georgia capital case, which is significant because of Justice Stevens' and Justice Thomas's separate statements about proportionality review and the constitutionality of the death penalty. Justice Stevens took issue with the Georgia Supreme Court's "utterly perfunctory" process of proportionality review, which, like the parallel process undertaken on direct appeals by the Missouri Supreme Court, did not examine any similar cases in which death was not imposed. Justice Stevens lamented that the Supreme Court's opinion in *Pulley v. Harris*, 465 U.S. 37 (1984), has been interpreted as removing any requirement of comparative proportionality review, notwithstanding the court's view in *Gregg v. Georgia*, 428 U.S. 153 (1976), that such review was an important component of the Georgia statute it upheld. Justice Stevens also observed that the Georgia Supreme Court significantly narrowed the scope of its proportionality review after *Pulley*. Justice Thomas expressed just the opposite view, opining that the Constitution does not require proportionality review, and that *Pulley* helpfully removed any doubt on the question. Notwithstanding his colleague's disagreement, Justice Stevens' statement is an invitation for future litigants to press the constitutional requirement of meaningful proportionality review. It also provides a lesson that trial and appellate counsel must continue to preserve the claim even in the face of adverse authority; Justice Stevens himself concurred with the denial of certiorari because Walker's claim was not preserved below.

MISSOURI SUPREME COURT DECISIONS

Taylor v. State, 262 S.W.3d 261 (Mo. banc 2008). In this capital case involving a prison murder, the Missouri Supreme Court held that the prosecution violated its obligations under *Brady v. Maryland* by destroying or otherwise not disclosing letters written by a prosecution witness, in which the witness asked for favorable treatment from the state. Prosecutors also suppressed memoranda of interviews with the witness, as well as the state's plan to wait until after trial to decide what sort of sentence reduction to confer upon the witness -- all the while arguing to the jury that there was no "deal." The court nevertheless upheld Taylor's conviction for first degree murder, reasoning that Taylor admitted to the killing and that the suppressed evidence did not substantially undermine the prosecution's proof of deliberation. A divided court went on to invalidate Mr.

Taylor's death sentence. The majority reasoned that the witness's testimony was highly relevant to one of the mitigating circumstances -- whether Mr. Taylor was acting under an extreme mental or emotional disturbance. The court also observed that the defense presented an otherwise substantial case in mitigation on post-conviction review, including a lengthy history of mental illness and physical abuse by his parents. The court not only vacated the death sentence under *Brady*, but held that trial counsel was ineffective for not presenting records of Mr. Taylor's troubled past, which were relied upon by the defense expert during the guilt phase and requested by the jury during deliberations. Judges Price and Russell dissented, and would have affirmed the sentence as well as the conviction.

Strong v. State, --- S.W.3d ---, No. SC 88311, 2008 WL 2929675 (Mo. banc July 31, 2008). In this capital Rule 29.15 appeal, the court rejected the prisoner's claim that trial counsel performed ineffectively by not voicing a religion-based Batson objection to the prosecutor's acknowledged striking of a potential juror simply because the potential juror was "religious." The court held that Strong could not demonstrate prejudice under Strickland v. Washington, because there was no showing or argument that the verdict might have been different if the religious juror had participated. It rejected Strong's argument that the error was "structural" in nature. Judges Wolff, Stith and Teitelman dissented.

State v. McLaughlin, --- S.W.3d ---, No. SC 88181, 2008 WL 3906355 (Mo. banc Aug. 26, 2008). In this direct appeal out of St. Louis County, the Missouri Supreme Court affirmed the conviction and death sentence imposed upon Scott A. McLaughlin. Among other claims, the court rejected McLaughlin's contention that he should have been sentenced to life when the jury deadlocked on the question of whether the mitigating circumstances outweighed the aggravating circumstances. The court noted that Missouri's pattern instructions were changed after the court's opinion in State v. Whitfield, 107 S.W.3d 253 (Mo. banc 2003), and that McLaughlin's jury deadlocked only after finding the necessary facts that made him death-eligible (i.e., that the murder was committed with depravity of mind because it involved repeated acts of physical abuse). The court also found no plain error in the prosecutor's penalty phase closing argument, which likened the jurors to soldiers.

EIGHTH CIRCUIT DECISIONS

Nelson v. United States, --- F.3d ---, No. 07-3071, 2008 WL 4697018 (8th Cir. Oct. 27, 2008). In an unpublished *per curiam* opinion, the Eighth Circuit reversed and remanded the district court's denial of relief in this capital section 2255 case involving an interstate kidnapping resulting in death. Without explanation, the court held that the district court was required to hold an evidentiary hearing on numerous claims, including trial counsel's failure to conduct an adequate mitigation investigation or to seek a continuance in order to conduct one; counsel's failure to investigate mental health and his advice that Mr. Nelson not subject himself to any mental evaluations; counsel's failure to object to various portions of the government's closing argument; and appellate counsel's failure to adequately review the record and to brief a claim regarding the government's closing argument. The court refused to order that District Judge Fernando J. Gaitan recuse himself, despite Mr. Nelson's argument of judicial bias.

Smulls v. Roper, 535 F.3d 853 (8th Cir. 2008) (en banc). Reversing an earlier panel's grant of relief, the Eighth Circuit en banc affirmed the district court's denial of relief on the habeas petition of Missouri death row inmate Herbert Smulls, who was convicted and sentenced to death by an all-white jury in St. Louis County. The prosecutor struck African-American veniremember Margaret Sidney, and claimed to do so because Ms. Sidney was silent during the death qualification process (when she was asked no questions) and worked as a mail sorter for a private company (the prosecutor explained that postal workers do not tend to be state-oriented jurors). The trial court denied the Batson challenge without allowing defense counsel to explain why the prosecutor's stated reasons were pretextual. When defense counsel sought to revisit the issue the next day, the trial judge refused to take judicial notice that Ms. Sidney is African-American or that her exclusion left Mr. Smulls with an all-white jury, explaining, "There were some dark complexioned people on this jury. I don't know if that makes them black or white. As I said, I don't know what constitutes black. Years ago they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people." The trial court again denied the Batson objection, but without making express findings on the issue of pretext. The Missouri Supreme Court, on direct appeal, ruled that the trial record did not contain sufficient evidence of pretext for Mr. Smulls to prevail -- never mind that the trial court deprived counsel of the opportunity to present such evidence.

On habeas review, the Eighth Circuit held that the trial court's lack of express findings did not violate the rule of Batson, and that the Supreme Court's more recent guidance in Snyder v. Louisiana, 128 S. Ct. 1203 (2008), was not "clearly established" law when the state courts resolved Mr. Smulls' claim. The Eighth Circuit also rejected Smulls' argument that the Missouri Supreme Court conflated steps two and three of the Batson

framework. The Missouri Supreme Court ruled that the trial court found that the proffered reasons for striking Ms. Sidney were race-neutral and that the trial court "did not clearly err" in overruling the Batson objection. Since the state court affirmed the denial of a Batson objection, the Eighth Circuit reasoned, it necessarily found that the stated reason was not a pretext for discrimination. Judges Bye and Smith bitterly dissented from the majority's strained reasoning: "The deferential standard of review called for by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) neither requires nor permits us to sacrifice fidelity to constitutional principles at the altar of federalism. Today the majority eschews this bedrock principle and deems the state trial court's flagrant disregard of Batson v. Kentucky, 476 U.S. 79, 93 (1986), constitutionally sound. In so doing, the court places its imprimatur upon a constitutionally flawed process which will ultimately lead to Herbert Smulls's death."

Barnett v. Roper, 541 F.3d 804 (8th Cir. 2008). In yet another case arising out of St. Louis County, the Eighth Circuit affirmed the denial of habeas relief to death-sentenced inmate David Barnett. Although the state forfeited its argument that Barnett's habeas petition was untimely by failing to advance that argument in the district court, the Eighth Circuit held Barnett procedurally defaulted his claim that counsel was ineffective for not discovering and presenting the testimony of witnesses to his troubled childhood, as well as related expert testimony. Barnett's post-conviction motion under Rule 29.15 listed hundreds of witnesses that trial counsel should have discovered and called, but it did not specify which particular testimony would have been given by which particular witness. The motion also failed to specifically allege that the witnesses would have been available for trial, or that trial counsel knew of their existence. For these reasons, the state courts ruled that the motion violated the fact-pleading requirements of Rule 29.15. The Eighth Circuit held that this aspect of Rule 29.15 is an "adequate" rule for purposes of procedural default, since it is readily ascertainable, regularly applied, and not "exorbitant" in the state interest it advances. The court also rejected Barnett's gender-based Batson claim, notwithstanding the prosecutor's admission that he struck a particular veniremember because she was "a very young female who is single."

Paul v. United States, 534 F.3d 832 (8th Cir. 2008). The Eighth Circuit affirmed the denial of section 2255 relief to federally death-sentenced inmate Jeffery Paul. Among other rulings, the court held that Paul was not prejudiced by trial counsel's failure to investigate and present extensive and detailed evidence that he was severely abused by his father; the court held that such evidence would have been largely cumulative of the testimony given by Paul's mother at trial, might have caused Paul to disrupt the trial proceedings, and would not have undermined the government's case in aggravation. The court also held that counsel was not ineffective for failing to challenge Paul's competence to stand trial or to investigate the issue. Finally, it held that any mental incompetence Paul suffered during post-conviction review did not appear to limit the development of his claims for relief, and thus, Paul was not entitled to a stay of the section 2255 proceedings under the rationale of Rohan ex rel. Gates v. Woodford, 334 F.3d 803 (9th Cir. 2003).

United States v. Honken, 541 F.3d 1146 (8th Cir. 2008). The Eighth Circuit upheld the murder conviction and death sentence in this direct appeal, in which the defendant and his girlfriend were convicted of killing a federal witness after Mr. Honken was indicted on drug trafficking charges. Among other claims, the court rejected Honken's contention that the trial judge abused his discretion by shackling the defendant, bolting the shackles to the floor, and forcing the defendant to wear a stun belt, in light of the defendant's previous escape attempts and stated intentions to kill witnesses and prosecutors.

Johnson v. Norris, 537 F.3d 840 (8th Cir. 2008). In this capital habeas appeal from Arkansas, the Eighth Circuit affirmed the district court's denial of relief and held that the Arkansas Supreme Court did not unreasonably reject Johnson's claim that his right to present a defense trumped the state's unqualified privilege covering statements made by the victim's daughter to her psychotherapist -- even though the defense challenged the daughter's competency to testify. The court concluded that no Supreme Court case squarely governs such circumstances, and thus denied relief under AEDPA.

Armstrong v. Kemna,534 F.3d 857 (8th Cir. 2008). The Eighth Circuit panel reversed the district court's denial of relief in this Missouri non-capital murder case, and remanded for a second federal evidentiary hearing. Before addressing the merits, the court declined the state's request that the court for the first time consider, sua sponte, whether Armstrong's habeas application was untimely. The court acknowledged that it could consider the question of timeliness pursuant to Day v. McDonough, 547 U.S. 198 (2006), but found that "the interests of justice would be better served by addressing the merits."

Armstrong's claim was that trial counsel had been ineffective in failing to properly determine whether Wisconsin -- the home of three defense witnesses -- had adopted the Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings, and in failing to secure the attendance of those witnesses at trial. After rejecting the district court's conclusion that counsel's performance had not been deficient in this regard, the Eighth Circuit

remanded for an evidentiary hearing at which to develop a record of what the missing witness would have said had they been called at trial. The court permitted a second hearing because the district court improperly limited its hearing to the question of whether counsel was effective. The district court also failed to appoint counsel for Armstrong, as required when a hearing is granted. See Hoggard v. Purkett, 29 F.3d 469, 471 (8th Cir.1994); Rule 8(c) Governing Section 2254 Cases.

Anjulo-Lopez v. United States, 541 F.3d 814 (8th Cir. 2008). Expressly disagreeing with the Second Circuit's opinion in Never Misses a Shot v. United States, 413 F.3d 781, 782 (2nd Cir. 2005), the court in this non-capital case upheld the dismissal of the defendant's section 2255 petition as untimely. Anjulo-Lopez argued that counsel was ineffective for not perfecting an appeal, but did not file his 2255 motion until several months after the one-year statute of limitation expired. The court held that Anjulo-Lopez was not entitled to statutory tolling during the period that he was incarcerated and did not know his attorney failed to file a notice of appeal; the court reasoned that Anjulo-Lopez did not act with "due diligence," since he failed to consult "publicly available information" that would have shown that his appeal had not been filed.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

FOURTH CIRCUIT

Gray v. Branker, 529 F.3d 220 (4th Cir. 2008). A majority of the Fourth Circuit panel granted sentencing phase relief in this North Carolina capital case, finding that trial counsel were ineffective for failing to investigate or present mental health evidence. Petitioner, a dentist, was convicted and sentenced for the murder of his estranged wife. Lead defense counsel had served as petitioner's divorce lawyer until the homicide, and neither lead counsel nor subsequently retained co-counsel had ever handled a capital case. Although counsel had been "confronted repeatedly with indications of Gray's mental impairment" -- e.g., pre-offense affidavits from two professionals describing "mental instability," multiple pre-offense statements from friends and associates indicating petitioner was disturbed, post-offense observations by jailers that petitioner was depressed, anxious and suffering "fainting spells," and a state hospital report indicating "'regression in behavior and reductions in impulse control' at the time of the offense," -- they undertook no mental health investigation and presented no mental health evidence. In finding that counsel's failure to investigate constituted deficient performance, the Fourth Circuit majority noted that petitioner had rebuffed lead counsel's only suggestion that a mental health investigation be pursued on the ground that the expense was not warranted and the investigation was unnecessary. The majority went on to find, however, that this did not absolve counsel of the obligation to investigate, explaining that the conversation between counsel and petitioner "occurred prior to indictment and long before Gray or his lawyers knew that he would be tried for a capital offense," and that mental health assistance would have been available at no cost to petitioner had counsel sought it. The majority found the state court's analysis under Strickland unreasonable because, among other things, the state court's heavy reliance on petitioner's initial refusal to agree to or fund a mental health investigation was unreasonable in that (a) the refusal occurred "quite early in the proceedings"; (b) a client's "self-assessment" does not absolve counsel's "independent duty to investigate"; (c) the state court's finding that petitioner was not indigent, and therefore ineligible for state-funded expert assistance, was rebutted by clear and convincing evidence that he actually was indigent at the relevant time; and (d) regardless of indigence, counsel had been offered assistance free of charge. The majority also held that Gray was prejudiced by counsel's errors, and that the evidence of his mental illness "would surely have provided a significant boost to Gray's mitigation case." It rejected, again as unreasonable under Strickland, the state court's ruling that petitioner needed to show that "the jury would necessarily have found the existence of the ... mitigating circumstances."

FIFTH CIRCUIT

Fratta v. Quarterman, 536 F.3d 485 (5th Cir. 2008). The Fifth Circuit affirmed the grant of relief in this Texas capital case, finding that the trial court's admission of custodial statements by petitioner's two co-defendants in a murder-for-hire scheme, and the admission of a hearsay description of one of the co-defendants' statements to his girlfriend, violated the Confrontation Clause. With regard to the co-defendants' custodial statements, the Fifth Circuit found that the Texas Court of Criminal Appeals' (CCA) decision upholding their admission was contrary to Idaho v. Wright, 497 U.S. 805 (1990), because the state court, in contravention of Wright, relied upon evidence corroborating the statements in order to conclude that the statements were reliable. The Fifth Circuit also found that the CCA misapplied Wright by analyzing the trustworthiness of the redacted statements as they were admitted at petitioner's trial, rather than examining the unredacted statements in their entirety. "[G[iven the contradictory, inconsistent, and self-serving nature of the custodial confessions," the Fifth Circuit added, "the general presumption of unreliability has not been rebutted." As to the co-defendant's statements to his

girlfriend, the Fifth Circuit found that the CCA's decision was contrary to and involved an unreasonable application of federal law to the extent it relied upon Bruton v. United States, 391 U.S. 123 (1968), and that the CCA's decision further involved an unreasonable application of Bourjaily v. United States, 483 U.S. 171 (1987), by treating statements not made in the course or furtherance of a conspiracy as nevertheless falling within a firmly rooted hearsay exception.

The Fifth Circuit went on to hold that a Confrontation Clause violation had occurred. The court reasoned that (1) although the statements exposed the declarant to the same criminal liability as his co-defendants, they limited his personal involvement in ways that "might later work to [his] advantage," (2) the statements were "not entirely spontaneous," (3) the statements were made to the declarant's girlfriend, and he "had an incentive to minimize or distort the extent of his involvement ... in order to placate and stay in good graces with [her]," and (4) the Fifth Circuit had "already considered a challenge to many of these very same statements ... in the context of a habeas petition filed by [the other co-defendant], and found that their admission ... violated the Confrontation Clause." The court held that the error was not harmless, reasoning that, "[i]t was only through the admission of the custodial confessions and [the co-defendant's] statements to [his girlfriend] that the jury was presented with a coherent picture of how the crime was carried out," and that "on the crucial point of whether Fratta had engaged [the co-defendants] to commit murder for remuneration, the inadmissible evidence was vital to the State's case."

Burbank v. Cain, 535 F.3d 350 (5th Cir. 2008). The Fifth Circuit affirmed the district court's grant of relief in this Louisiana non-capital double murder case, finding that the trial court's error in limiting defense counsel's cross examination of the state's main witness was not harmless under Brecht. Petitioner was charged with two counts of murder, and the only evidence against him was the testimony of one witness who claimed to have seen him shoot the two decedents. While the eyewitness was impeached on various grounds, the trial court refused to permit defense counsel to question her about a tentative plea agreement under which she would avoid a potential sentence of 25 years to life and instead receive a sentence of one year. Emphasizing the witness's status as the central pillar of the state's case, and noting that evidence of the witness's strong motive to curry favor with the prosecution could have "seriously undermined" her credibility, the Fifth Circuit concluded that the trial court's error in forbidding the relevant inquiry "was not harmless and therefore merits habeas relief." Having acknowledged earlier in its opinion that Fry v. Pliler, 127 S.Ct. 2321 (2007), established "that the Brecht standard subsumes the standards announced in AEDPA," the Fifth Circuit did not undertake any further analysis of the state court decision under §2254(d).

ELEVENTH CIRCUIT

Williams v. Allen, 542 F.3d 1326 (11th Cir. 2008). In this Alabama capital case, the trial judge overruled the jury's 9-3 life recommendation and sentenced the defendant to death. On habeas review, the Eleventh Circuit held that trial counsel performed ineffectively by limiting his investigation of Williams' background to (a) a report by a defense psychologist, who measured Williams' IQ at 83 but interviewed noone other than Williams himself, (b) a PSI which disclosed that Williams' father was an alcoholic who physically abused his wife and children and that Williams had sought psychiatric treatment in the past, and (c) an interview with Williams' mother. The Court declined to specify a minimum number of witnesses that counsel should interview, but it held that Williams' counsel should have investigated his client's background in greater detail based on the leads that his limited investigation revealed. Counsel failed to discover evidence that Williams was beaten frequently and severely as a child, often with deadly weapons; that he was deprived of sufficient food and clothing; and that his parents and other caregivers neglected his basic hygiene and medical needs. In holding that Williams was prejudiced, the court observed that his case was not particularly aggravated and that the jury voted 9-3 for life. It also held that the state court's decision was unreasonable because it held that the mitigating evidence did not absolve Williams of criminal responsibility for the underlying murder -- a notion that is flatly rejected by the Supreme Court's opinion in Williams v. Taylor, 529 U.S. 362, 397-98 (2000).

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