THE PUBLIC INTERST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE

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NOTEWORTHY NEWS

MISSOURI LETHAL INJECTION UPDATE

Without explanation, the Missouri Supreme Court ordered a re-argument of the plaintiffs' appeal in *Middleton et al. v. Missouri Dept. of Corrections et al.* (Case No. SC 89571). The suit contends that the Department of Corrections' lethal injection protocol was developed in violation of the Missouri Administrative Procedure Act and its requirements of public notice and participation. The court entertained oral argument for a second time January 22, having earlier taken argument on October 7. As before, we cannot know when the court will issue a ruling. In the meantime, several death-sentenced prisoners continue to challenge the state's execution method in federal court. Oral argument in the Eighth Circuit is set for February 11 at the Washington University School of Law. The case is *Clemons et al. v. Crawford et al.* (8th Cir. No. 08-2895).

OPT-IN DEVELOPMENTS

The bad news: On December 11, 2008, the U.S. Attorney General issued a "final rule" embodying the DOJ's scant requirements governing certification of state mechanisms for appointing post-conviction counsel in death penalty cases. If certified by the Attorney General, a state's capital convictions will be subject to expedited and narrowed review on federal habeas, under the USA Patriot Improvement and Reauthorization Act of 2005.

The good news: A federal district court in California has questioned the Attorney General's compliance with the Administrative Procedure Act, preliminarily enjoined the rule's enforcement, and required the DOJ to take public comments for another thirty days. Among other problems, the court noted that the DOJ only recently made clear its intention that any new certifications would override previous *judicial* rulings that particular state mechanisms did not satisfy the statute, including rulings that defined and interpreted the statute's terms. *See, e.g., Hall v. Luebbers*, 341 F.3d 706, 711-12 (8th Cir. 2003) (holding that Missouri Rule 29.16 d not qualify because it did not "offer" counsel to every death-sentenced inmate, but rather, required the prisoner to file a pro se motion for post-conviction relief). The California case is *Habeas Corpus Resource Center v. United States Dept. of Justice*, No. C 08-2649 CW (N.D. Calif.). PILC thanks the Habeas Corpus Resource Center and its outstanding work in this area.

The better news: The Obama administration has announced a freeze of all pending regulations issued by the Bush administration, pending a "legal and policy review . . . .by the Obama administration." The capital defense community is hopeful that the administration will withdraw the rule, and with it, the federal government's attempt to eviscerate the appropriately heightened standards governing opt-in certification to date. Nothing less than the Great Writ is at stake. We are fortunate that the DOJ did not finalize its rules earlier, and that a new administration can make good on its pledge to foster and respect the rule of law.

TERRI BACKHUS JOINS PILC AS EXECUTIVE DIRECTOR

On December 1, 2008, Terri L. Backhus took over as executive director of the Public Interest Litigation Clinic. A Missouri native, Ms. Backhus comes to PILC with seventeen years' experience of capital litigation in Florida, including a stint as Capital Collateral Regional Counsel in Tampa before that office was reorganized by Governor Jeb Bush. Prior to moving to Florida in 1991, Ms. Backhus worked for the Missouri Public Defender in Kansas City for two and a half years. PILC welcomes Terri's arrival and is already benefitting from her managerial and legal experience.

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US SUPREME COURT RECENT DECISIONS

Waddington v. Sarausad, --- S. Ct. ---, No. 07-772, 2009 WL 129033 (Jan. 21, 2009). The Supreme Court reversed the Ninth Circuit's grant of habeas relief in this non-capital case from Washington involving a gang-related drive-by shooting. The driver, Sarausad, was convicted of second degree murder despite his defense that he thought the car's occupants planned only to start a fistfight rather than kill anyone. A jury instruction did not clearly define accomplice liability and did not specify that a conviction required proof that Sarausad knew of his colleagues' intention to shoot people. Sarausad's conviction was upheld on direct appeal, with the court holding that an accomplice need not know of or attempt to assist the actual crime of murder (the "in for a dime, in for a dollar" rule). Subsequent Washington law narrowed accomplice liability and rejected the "in for a dime, in for a dollar" rule, but courts held that Sarausad was not prejudiced by the instruction at his trial. The U.S. Supreme Court disagreed with the Ninth Circuit's conclusion that the state courts had unreasonably applied federal constitutional law. In a six-to-three opinion authored by Justice Thomas, the court held that it was reasonable for the Washington courts to find no "reasonable likelihood" that the instructions relieved the prosecution of its burden of proof.

Jimenez v. Quarterman,--- S. Ct. ---, No. 07-6984, 2009 WL 63833 (Jan. 13, 2009). In this burglary case, the Texas Court of Criminal Appeals allowed the prisoner to file an out-of-time appeal in 2004, having found that he was earlier deprived of his right to appeal. The Supreme Court unanimously held that the petitioner's state court conviction did not become "final" purposes of the habeas limitation period until 2004, rather than when the prisoner's conviction became "final" for the first time, in 1996. By re-opening the direct appeal and then resolving it, the state court established a new date on which the conviction became "final" through "the conclusion of direct review or the expiration of the time for seeking such review" under 28 U.S.C. § 2244(d)(1)(A).

Hedgpeth v. Pulido, 129 S. Ct. 530 (Dec. 2, 2008). In this felony-murder case from California, the jury was erroneously instructed that it could convict the defendant of murder even if it believed his defense that he did not intend to assist the underlying robbery until *after* his co-perpetrator shot and killed the victim. The jury was also instructed, correctly, that it could convict Pulido if he formed this intent before the shooting. The Supreme Court held that the resulting error is not "structural," and it remanded to the Ninth Circuit for a determination of whether the error had a "substantial and injurious effect or influence in determining the jury's verdict" under Brecht v. Abrahamson, 507 U.S. 619, 623 (1993).

CERT GRANTED

Osborne v. District Attorney's Office for the Third Judicial District, 129 S. Ct. 488 (2008) (Case No. 08-6). The court granted certiorari to consider whether a prisoner may proceed under 42 U.S.C. § 1983 in order to obtain DNA evidence when he is not currently challenging his conviction, and, relatedly, whether due process confers a right to seek such evidence in support of a future "freestanding" claim of innocence.

McDaniel v. Brown, --- S. Ct. ---, 2009 WL 160636 (Jan. 26, 2009) (Case No. 08-559). In this case the court granted certiorari to consider whether, for purposes of the AEDPA, the evidence underlying Brown's conviction for sexual assault was clearly insufficient under Jackson v. Virginia, 443 U.S. 307 (1979), and relatedly, the scope of evidence a habeas court may consider in reaching that question.

Bobby v. Bies, --- S. Ct. ---, 2009 WL 104301 (Jan. 16, 2009) (Case No. 08-598). The court granted certiorari to determine whether the double jeopardy clause forbids a state from challenging a convicted killer's mental retardation, if a state court has previously found the prisoner to be mentally retarded.

EIGHTH CIRCUIT DECISIONS

Sasser v. Norris, --- F.3d ---, No. 07-2385, 2009 WL 179086 (8th Cir. Jan. 23, 2009). Relying on Simpson v. Norris, 490 F.3d 1029 (8th Cir. 2007), the Eighth Circuit reversed the district court's ruling that Arkansas capital inmate Andrew Sasser procedurally defaulted his claim of mental retardation under Atkins v. Virginia, 536 U.S. 304 (2002), by not arguing mental retardation under a state statute available at the time of his trial. The court reaffirmed *Simpson*'s holding that a defendant in Sasser's position did not forfeit a distinctly *federal* right that did not yet exist. The court also rejected the state's argument that Sasser's Atkins claim was not timely asserted; Sasser sought leave to file a successive petition within a year of Atkins but did not file an actual Atkins claim until some fifteen months later. The court declined to address the timeliness issue because the state asserted it for the first time on appeal.

United States v. Street, 548 F.3d 618 (8th Cir. 2008). The Eighth Circuit reversed defendant John P. Street's federal conviction for murder in furtherance of drug trafficking. A jury hung on guilt-or-innocence at Street's first trial, but a second jury convicted Street and

deadlocked on punishment, leading to a life sentence. The court held that District Judge Gary A. Fenner erred by allowing a detective to describe, at length, the violent tendencies of the El Forasteros motorcycle gang in Kansas City, without tying the events described to Street. The court noted that the case for conviction was close, and it found the error reversible. It also held that Judge Fenner erred by denying a mistrial following a police officer's testimony that Street admitted to failing a lie detector test.

United States v. Bolden, 545 F.3d 609 (8th Cir. 2008). In this direct appeal, the Eighth Circuit affirmed the federal murder conviction and death sentence imposed upon Robert Bolden for crimes stemming from a bank robbery in St. Louis. Among other things, the court held that the "pecuniary gain" aggravating circumstance was satisfied by Bolden's participation in the robbery, and that the factor is not limited to "murder for hire" cases. The court also rejected Bolden's argument that the same prior conviction cannot support both a statutory and non-statutory aggravating circumstance regarding a defendant's criminal record.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

FIFTH CIRCUIT

Reed v. Quarterman, --- F.3d ---, No. 05-70046, 2009 WL 58903 (5th Cir. Jan. 12, 2009). The Fifth Circuit granted habeas relief on Reed's Batson claim, holding that the Dallas County prosecutor's stated reasons for striking two black jurors were pretexts for discrimination. For some of the explanations, the state misconstrued the jurors' testimony. For others, the state accepted white jurors who exhibited similar, but not necessarily identical, characteristics. Following the Supreme Court's decision in Miller-El v. Dretke, 545 U.S. 231 (2005), the court remarked that "[a] per se rule that a defendant cannot win a Batson claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters." The Fifth Circuit also relied on a comparative juror analysis in upholding Reed's claim, even though much of that analysis was not presented to the trial court. The court reasoned that Texas had no adequate and independent procedural rule consistently requiring comparative juror analysis to be fully presented at trial.

Thompson v. Connick, --- F.3d ---, No. 07-30443, 2008 WL 5265197 (5th Cir. Dec. 19, 2008). The Fifth Circuit upheld a civil jury award of $14 million to death row exoneree John Thompson. Defense attorneys discovered suppressed exculpatory evidence only after an execution date had been set. Thompson was then retried, and a jury acquitted him after 35 minutes of deliberation. In trying to overturn the civil judgment, the prosecutor's office argued, among other things, that Thompson was never raped during his eighteen years in prison, that he was fed and given necessary medication, that he made friends with other inmates, and that he was allowed to have visitors, watch television and play chess. Even the Fifth Circuit found these arguments unmoving.

SIXTH CIRCUIT

Johnson v. Bagley, 544 F.3d 592 (6th Cir. 2008). A majority of the Sixth Circuit panel affirmed the grant of relief on petitioner's sentencing phase ineffective assistance of counsel claim in this Ohio capital case. The court noted three conspicuous flaws in trial counsel's investigation. First, counsel declined to even interview Johnson's mother, reasoning that her background as a drug addict and prostitute would make her a bad witness. Second, counsel proffered hundreds of pages of social service documents to the trial court, but without fully reviewing them or adjusting trial strategy in light of their contents. The records revealed that counsel's chosen star mitigation witness, Johnson's grandmother, had been abusive. Third, the court explained that the mitigation investigation was completely unstructured and unsupervised, and that counsel did not even begin to think about selecting a mitigation strategy until after petitioner had been found guilty. The court rejected as "unreasonable" under AEDPA the state court's determination that the evidence in question was actually presented "in some form" at trial. "[T]he [trial] testimony only scratched the surface of Johnson's horrific childhood. And even if it is true that some aspects of [the mother's and grandmother's] problematic roles in Johnson's life could be gleaned from reviewing the 12-inch stack of files that defense counsel obtained from Human Services and admitted into evidence, that does not mean defense counsel performed a reasonable investigation or for that matter reasonably used the evidence." The court also rejected the state's contention that the family witnesses themselves were to blame for trial counsel's unproductive interviews. "Uncooperative defendants and family members ... do not shield a mitigation investigation (even under AEDPA's deferential standards) if the attorneys unreasonably failed to utilize other available sources that would have undermined or contradicted information received." The court went on to hold that Johnson was prejudiced by counsel's deficient advocacy.

TENTH CIRCUIT

United States v. Benally, 546 F.3d 1230 (10th Cir. 2008). In this federal assault case involving a Native American defendant, the Tenth Circuit held that evidence that jurors were making racist statements during deliberations is not admissible under Federal Rule of Evidence 606(b). The court expressly disagreed with the Ninth Circuit's contrary conclusion in United States v. Henley, 238 F.3d 1111 (9th Cir. 2001) (holding that such testimony may be admitted where juror, on voir dire, has been asked about racial bias and denies having any). The Tenth Circuit agreed with the Third Circuit's opinion in Williams v. Price, 343 F.3d 223 (3rd Cir. 2003) (per Alito, J.).

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

SOUTH CAROLINA

Council v. State, 670 S.E.2d 356 (S.C. 2008). The South Carolina Supreme Court affirmed the grant of penalty phase relief in this post-conviction case. The court faulted trial counsel for failing to provide his expert -- a forensic psychiatrist -- with "sufficient records," and for directing the expert to evaluate only the defendant's competency and criminal responsibility rather than mitigating circumstances. Counsel also chose not to retain a social history investigator even though funding was available for one. Counsel additionally failed to obtain family records, reasoning that they were unimportant because they did not directly involve the defendant. The court deemed this decision "inexplicable."

FLORIDA

Nowell v. State, --- So.2d ---, No. SC06-276, 2008 WL 5396698 (Fla. Dec. 30, 2008). The court reversed the defendant's murder conviction and death sentence in this direct appeal, holding that the trial court should have sustained defense counsel's Batson objection to the striking of a Hispanic juror. The court held that the prosecutor's "general feeling or dislike" of a juror is not considered a "genuine race-neutral reason" for exercising a strike. It also observed that although the State claimed to strike the juror because of his young age, the State did not strike an even younger white juror. The court also rejected the prosecutor's assertion that he was worried about the juror's ability to follow the law, since the juror's statements on voir dire did not support that concern.

State v. Pearce, 994 So.2d 1094 (Fla. 2008). The Florida Supreme Court upheld the trial court's ruling that counsel performed ineffectively in preparing for the penalty phase of trial. Although the defendant waived all mitigation, counsel did not, at any point prior to the waiver, investigate Pearce's background, interview his relatives, or examine mental health issues. The court therefore held that Pearce's waiver of mitigating evidence was not knowing, voluntary and intelligent.

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