THE PUBLIC INTERST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE

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NOTEWORTHY NEWS

EIGHTH CIRCUIT STAYS EXECUTION OF REGINALD CLEMONS; DEATH PENALTY AGAIN ON HOLD IN MISSOURI

On May 18, the Missouri Supreme Court set an execution date of June 17 against Reginald Clemons. The court overruled a motion to stay the execution in light of *Clemons et al. v. Crawford et al.* (8th Circuit Case Nos. 08-2895, 08-2807, 08-2813, 08-2894). The *Clemons* case challenges Missouri's lethal injection procedures based on the DOC's historically inadequate vetting of execution personnel. Among other problems, the State's previous executioner was a dyslexic surgeon who had trouble mixing the anesthetic and varied the amount from execution to execution, and the DOC's current execution team includes a nurse practitioner with a conviction for aggravated stalking. The Eighth Circuit held oral argument in February but has not yet issued a ruling. On June 5, though, the Eighth Circuit granted Clemons' motion for a stay. The State allowed the scheduled date to pass without seeking rehearing. We cannot read much into the court's issuance of a stay, but it justifies at least some optimism that the court might reverse the district court's grant of judgment on the pleadings and remand the case for fuller discovery and a hearing.

In the meantime, incoming Missouri Supreme Court Chief Justice William Ray Price gave an interview to the media and said that "We're back on hold" in light of the stay in *Clemons.* Chief Justice Price explained that a federal decision in *Clemons* could apply to all Missouri prisoners facing execution. *See* "Missouri Executions on Hold Because of Federal Review," *Kansas City Star*, Jun. 23, 2009. He doubts the court will act on the many pending requests for execution dates that are now before it, "as the 8th Circuit is looking at issues of general applicability." It is, of course, lamentable that this realization eluded the Missouri Supreme Court until after the execution of Dennis Skillicorn, who argued that the court should refrain from setting his execution because of *Clemons* and its statewide implications.

DENNIS SKILLICORN EXECUTED MAY 20

The State of Missouri executed Dennis J. Skillicorn on May 20 – the first Missouri execution in three and a half years. Mr. Skillicorn is the sixty-seventh prisoner to be executed by Missouri in the post-*Furman* era. The courts rejected a number of meritorious challenges to the execution as the date approached. These included a section 1983 suit challenging Governor Jay Nixon's status as clemency decisionmaker in light of former Attorney General Nixon's acts of obstructing Skillicorn's access to evidence that he was a model inmate whom guards and other personnel asked to be spared; state and federal habeas remedies asserting that the recent decision in *Cone v. Bell*, 129 S. Ct. 1769 (2009), justified re-examination of a *Brady* claim involving an unadjudicated murder in Mexico and the prosecution's failure to disclose that it had extensively investigated the murder but found no evidence that it occurred; a petition for writ of certiorari challenging, on due process grounds, the Missouri Supreme Court's ruling in *Middleton et al. v. Missouri Dept. of Corrections et al.*, 278 S.W.3d 193 (Mo. banc 2009); and a federal suit challenging the DOC's execution procedures as a violation of the Federal Controlled Substances Act and the Federal Food, Drug and Cosmetic Act. Mr. Skillicorn had earlier asked the Missouri Supreme Court not to schedule his execution in light of the *Clemons* litigation (see above), but to no avail.

SUPREME COURT REJECTS DUE PROCESS RIGHT TO DNA TESTING

In *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009), a five-vote majority held that procedural and substantive due process do not entitle a post-conviction prisoner to access physical evidence in order to conduct a DNA test, even at the prisoner's expense. The breadth of the *Osborne* decision is unclear, and the reader should pay close attention to the facts making Mr. Osborne's claim particularly unsympathetic (including counsel's strategic decision *not* to seek DNA testing at trial, as well as Osborne's sworn testi-

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mony admitting guilt at two parole hearings). The decision is nevertheless discouraging and reflects the need for greater legislative efforts at the federal and state levels.

NEBRASKA ENACTS LETHAL INJECTION STATUTE

On May 28, Nebraska's governor signed a bill adopting lethal injection as the method of execution. Nebraska's statute had previously specified electrocution, but the state supreme court last year held that electrocution violated the state constitutional cruel-and-unusual-punishment clause. Nebraska has 11 death row inmates, and its most recent execution was in 1997.

STATE LEGISLATURES CONSIDER ABOLITION

Although only New Mexico has abolished the death penalty this year, an abolition bill passed both chambers of the legislature in Connecticut, only to be vetoed by the governor on June 7. In three other states – Colorado, Montana and New Hampshire – abolition bills have been approved by one chamber of the legislature this year. And in Maryland, the legislature rejected a bill to abolish the death penalty, but limited the death penalty to cases in which the defendant's guilt is proven by DNA, other biological evidence, a video tape, or the defendant's voluntary confession.

NEW STUDY CONFIRMS OVERWHELMING CONSENSUS THAT THE DEATH PENALTY DOES NOT DETER MURDER

A recent study confirms that eighty-eight percent of the country's top criminologists do not believe that the death penalty acts as a deterrent to homicide. *See* Michael L. Radelet and Traci L. Lacock, "Do Executions Lower Homicide Rates?: The Views of Leading Criminologists," 99 *J. Crim. L. & Criminology* 2 (2009). Study respondents were not asked for their personal opinion about the wisdom of the death penalty, but instead to answer the questions only on the basis of their understandings of the empirical research. According to the authors, "Our survey indicates that the vast majority of the world's top criminologists believe that the empirical research has revealed the deterrence hypothesis for a myth."

US SUPREME COURT RECENT DECISIONS

District Attorney's Office for the Third Judicial District v. Osborne, 129 S. Ct. 2308 (2009). By a vote of five-to-four, the Supreme Court held that a prisoner has no procedural or substantive due process right to post-conviction access of the prosecution's evidence for the purpose of conducting DNA testing at the prisoner's expense (at least under the circumstances of Osborne's case). Osborne was convicted of sexual assault and other crimes in Alaska, and eventually brought suit under 42 U.S.C. § 1983. The Supreme Court reserved the question of whether Osborne should have proceeded by way of habeas corpus rather than section 1983. But on the merits, the court upheld the three-part test utilized by the Alaska courts in determining whether to authorize DNA testing through discovery in postconviction proceedings: the DNA evidence being sought must be newly available, diligently pursued, and sufficiently material to the conviction. The facts of Osborne's case were problematic, both under state law and in building a due process claim. Among other things, his trial counsel elected not to seek an earlier form of DNA testing, believing that it would establish his guilt. Osborne later swore, under oath, that he was guilty during parole proceedings. Finally, the majority observed that Osborne had not asked for the newly available STR-type testing in state court (although the dissent questioned this premise). In the course of rejecting the procedural due process claim, the majority criticized the Ninth Circuit's premise that the prosecution's *Brady* obligations extend beyond conviction. The court likewise refused to recognize a substantive due process right, reasoning that it might squelch otherwise robust legislative developments, including a federal statute and DNA statutes in 45 states. Justice Stevens' dissent compared the majority opinion to *Powell v. Alabama*, 287 U.S. 45 (1932), which refused to federalize the question of whether a court must appoint counsel for indigent criminal defendants.

Melendez-Diaz v. Massachusetts, — S. Ct. —, No. 07-591, 2009 WL 1789468 (U.S. June 25, 2009). In another 5-4 decision, the Supreme Court held that a notarized laboratory report identifying the substance seized from the defendant's car as cocaine was "testimonial" under the reasoning of *Crawford v. Washington*, 541 U.S. 36 (2004), and therefore, that the defendant was entitled to confront the chemist who authored the report unless (a) the witness was unavailable for trial *and* (b) the defendant had an earlier opportunity to cross-examine him.

Yeager v. United States, 129 S. Ct. 2360 (2009). In this white collar case involving the downfall of Enron, the Supreme Court held that double jeopardy *might* preclude retrial when a jury convicts the defendant on some counts but hangs on others. Defendant Yeager was acquitted on various fraud counts, but the jury hung on various insider trading counts. At issue was whether the defendant and other Enron executives deceived the public about the viability of a telecommunications system known as the Enron Intelligent Network, withheld information about the system's drawbacks and problems, and then sold company stock before these problems became apparent to outsiders. After the jury's verdicts and non-verdicts, the Government sought to retry Yeager on the hung insider trading counts. By a vote of six-to-three, the Supreme Court held that the hung counts were "non-events" that are irrelevant in assessing the preclusive effect of the acquittals for double jeopardy purposes. Rather, the double jeopardy question depends on whether the jury necessarily resolved material factual issues that would be relitigated in a second trial. *See Ashe v. Swenson*, 397 U.S. 436 (1970). The court therefore remanded to the Fifth Circuit for reconsideration of whether the jury resolved the insider trading issue when it acquitted Yeager of fraud. Dissenting, Justice Scalia disagreed with the majority's purported "extension" of *Ashe*, which involved serial trials and prosecutions, as opposed to a single case in which jeopardy has not yet un-attached. Justice Kennedy's separate concurrence, as well as Justice Alito's separate dissent, make clear that Mr. Yeager might not prevail on remand. Among other possibilities, the jury might have acquitted Yeager of fraud if he did not issue or cause to be issued the false statements about the Enron Intelligence Network. But *that* factual proposition is not necessary for a conviction of insider trading, involving Yeager's sale of stock based on his non-public knowledge about the company's problems. Whether *Yeager* assists any substantial number of defendants remains to be seen.

Bobby v. Bies, 129 S. Ct. 2145 (2009). In this procedurally unusual capital case from Ohio, the Supreme Court unanimously held that principles of issue preclusion underlying the Double Jeopardy Clause do not preclude the state courts from conducting a full and fair post-*Atkins* determination of whether Bies is mentally retarded, despite a pre-*Atkins* determination that Bies is, in fact, mentally retarded. During his trial in 1992 – or ten years before *Atkins* – the defendant presented evidence of his mild to borderline mental retardation as mitigating evidence. In the course imposing and reviewing Bies's death sentence, the Ohio courts acknowledged the evidence of his retardation but ruled that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. After the state courts denied summary judgment to Bies in a post-conviction action after *Atkins*, he sought federal habeas review to preclude a hearing, and the Sixth Circuit held that the scheduled hearing would amount to Double Jeopardy. The Supreme Court unanimously reversed. First, the court reasoned, Bies was not "twice put in jeopardy," but rather, was sentenced to death only once. Neither was Bies ever "acquitted" of the death penalty. Second, the court observed that under *Ashe v. Swenson*, 397 U.S. 436 (1970), an issue is precluded in subsequent litigation only when the issue was actually litigated, determined, and essential to the judgment in the earlier litigation. An issue is "essential to the judgment" only if it is outcome-determinative, and, the existence of mental retardation at trial and on direct appeal did not dispose of the question of the weight of aggravating and mitigating circumstances. Third and finally, the intervening decision of *Atkins* justified an exception to issue preclusion because it changed the legal landscape. Because *Atkins* altered the significance of mental retardation, prosecutors before *Atkins* had little incentive to dispute whether a defendant is mentally retarded. The Supreme Court therefore reasoned the state courts should have been allowed to proceed with a first post-*Atkins* determination of whether Bies is retarded.

Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009). In this civil case from West Virginia, a divided Supreme Court ruled that due process required the recusal of one of the justices of the state supreme court. The plaintiff had obtained a judgment of $50 million against the defendant coal company. The coal company then donated some $3 million to the election campaign of a candidate for the state supreme court. That candidate won the election, which unseated his opponent. On appeal of the $50 million dollar judgment, the new justice participated in the case and was a member of a three-to-two majority reversing the judgment. The justice in question denied numerous motions to recuse himself. The Supreme Court held, in a 5-4 decision, that the justice's participation in the appeal violated due process. The court likened the case to two categories of cases in which the law presumes the tribunal's bias: first, when a judge has a direct pecuniary interest in a case, and second, when a judge has participated in deciding whether criminal charges should be brought, and then presided over the charges themselves. The court acknowledged that the new justice was not subjectively impartial, and it did not find actual bias. It nevertheless found a "serious risk of actual bias" under the circumstances, i.e., "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case." The coal company's contributions to the new justice were greater than all other combined contributions to the justice's campaign. The court observed, "just as no man is

allowed to be a judge in his own cause, similar fears of bias can arise when – without the consent of the other parties – a man chooses the judge in his own cause." The reach and implications of *Caperton* remain unclear, but for present purposes, the decision provides yet another means to attack death sentences that are secured and affirmed by elected judges – particularly when capital punishment is an issue in the election.

Montejo v. Louisiana, 129 S. Ct. 2079 (2009). By a 5-4 vote, the Supreme Court overruled its earlier opinion in *Michigan v. Jackson*, 475 U.S. 625. *Jackson* held that after a defendant invokes his or her Sixth Amendment right to counsel at an arraignment or similar proceeding, the defendant cannot validly waive that right as to any police-initiated interrogation. *Jackson*'s overruling leaves Mr. Montejo and similar defendants with only the *Fifth Amendment* protections of *Edwards v. Arizona*, 451 U.S. 477 (1981). Suppression of police-initiated confessions, then, will depend on whether the defendant has actually requested counsel, and not on whether the defendant is represented by counsel, or whether formal adversarial proceedings have commenced.

Arizona v. Gant, 129 S. Ct. 1710 (2009). The court held that an officer's search of a vehicle incident to an arrest is not "reasonable" under the Fourth Amendment when the suspect is removed from his car and is not within reach of any weapons that might threaten the officer's safety, or within reach of any evidence that the suspect might hide or destroy. Police may nevertheless search the vehicle if there is probable cause to believe that the vehicle contains evidence of the offense for which the suspect has been arrested, but not any other offenses.

CERT GRANTED

Wood v. Allen, 129 S. Ct. 2389 (2009). The Court granted certiorari to consider two questions in this case, in which the Eleventh Circuit reversed the district court's grant of habeas relief:

1. Whether a state court's decision on post-conviction review is based on an unreasonable determination of the facts when it concludes that, during the sentencing phase of a capital case, the failure of a novice attorney with no criminal law experience to pursue or present evidence of defendant's severely impaired mental functioning was a strategic decision, while the court ignores evidence in the record before it that demonstrates otherwise?

2. Whether the rule followed by some circuits, including the majority in this case, abdicates the court's judicial review function under the [AEDPA] by failing to determine whether a state court decision was unreasonable in light of the entire state court record and instead focusing solely on whether there is clear and convincing evidence in that record to rebut certain subsidiary factual findings?

Beard v. Kindler, 129 S. Ct. 2381 (2009). The Court granted certiorari to consider the following question: "Is a state procedural rule automatically 'inadequate' under the adequate-state-grounds doctrine - and therefore unenforceable on federal habeas corpus review - because the state rule is discretionary rather than mandatory?"

Graham v. Florida, 129 S. Ct. 2157 (U.S. May 4, 2009) (No. 08-7412), and Sullivan v. Florida, 129 S. Ct. 2157 (U.S. May 4, 2009) (No. 08-7621). In these cases, the Supreme Court will consider whether a sentence of life without parole imposed on a juvenile for a non-homicide crime constitutes cruel and unusual punishment in violation of the Eighth Amendment.

Florida v. Powell, — S. Ct. —, No. 08-1175, 2009 WL 741877 (U.S. June 22, 2009). The Court granted certiorari to consider whether *Miranda* warnings must include an explicit assurance that the suspect has the right to a lawyer during the questioning by police.

MISSOURI STATE COURT DECISIONS

State v. Johnson, — S.W.3d —, No. SC 89168, 2009 WL 1456341 (Mo. banc May 26, 2009). In this case from St. Louis County, the Missouri Supreme Court upheld the murder conviction and death sentence of Kevin Johnson for killing a police officer. Among the claims rejected by the court were a *Batson* claim, a claim that a juror committed misconduct by failing to disclose that she knew one of the testifying police officers, and instructional and prosecutorial errors stemming from the elusive distinction between first and second degree murder (deliberation for any length of time "no matter how brief"). Judge Teitelman dissented on the *Batson* issue.

State v. Forrest, — S.W.3d —, No. SC89343 (Mo. banc June 16, 2009). The Missouri Supreme Court affirmed the denial of Rule 29.15 relief to death-sentenced inmate Earl Forrest. The court rejected a number of claims that trial counsel performed ineffectively. These claims include trial counsel's failure to obtain a PET scan, to discover and present medical records showing previous head injuries, to discover and present further evidence of Mr. Forrest's personal and family history (including abuse from his alcoholic father), and to develop and present expert evidence that Mr. Forrest was unlikely to be a dangerous inmate if sentenced to life imprisonment.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Wolfe v. Johnson, 565 F.3d 140 (4th Cir. 2009). In this capital case from Virginia, the Fourth Circuit remanded for a fuller consideration of the prisoner's contention of actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), as a gateway to his procedurally defaulted claims under *Brady* and *Giglio* asserting the prosecution's use of false testimony. The Fourth Circuit faulted the district court for resolving only the prisoner's "freestanding" claim of innocence under *Herrera v. Collins*, 506 U.S. 390 (1993), because the prisoner might be able to meet the "less stringent" standard of *Schlup*. The district court also erred by not taking the habeas petition's factual allegations as true, at least without conducting an evidentiary hearing. The Fourth Circuit also remanded for a consideration of whether the petitioner was diligent in seeking to present the facts underlying his claims in state court, while strongly suggesting that he was, and therefore, is entitled to a hearing.

Kamienski v. Hendricks, No. 06-4536, 2009 WL 1477235 (3rd Cir. May 28, 2009) (unpublished). In this non-capital case from New Jersey, the Third Circuit held that the evidence was constitutionally insufficient to convict the defendant of murder and felony murder, and that the state appeals court had unreasonably applied *Jackson v. Virginia*, 443 U.S. 307 (1979), in deciding otherwise. There was ample evidence that the defendant participated in a conspiracy to distribute drugs, but that felony does not trigger "felony murder" under New Jersey law. In contrast, there was no evidence that Kamienski intended for the victims to be robbed or killed during the transaction, and the prosecutor even conceded those points on closing argument.

United States v. Hammer, 564 F.3d 628 (3rd Cir. 2009). Following the district court's grant of sentencing phase relief on a *Brady* claim in this section 2255 case, both parties appealed. The government appealed the grant of sentencing relief, while the prisoner appealed the denial of guilt phase relief. The Third Circuit dismissed the appeal, reasoning that the district court's grant of relief wasn't final because the court hadn't re-sentenced Mr. Hammer.

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