THE PUBLIC INTEREST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE
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NOTEWORTHY NEWS

TROY DAVIS GRANTED HEARING ON CLAIM OF ACTUAL INNOCENCE

In an extraordinary development, the U.S. Supreme Court ordered an evidentiary hearing on Troy Davis's petition for habeas corpus, filed under the court's original jurisdiction. *In re Davis*, — S. Ct. —, No. 08-1443, 2009 WL 2486475 (Aug. 17, 2009). The case presents the question of whether habeas relief is available on a free-standing claim of actual innocence. In Davis's case, seven of the nine witnesses who implicated him at trial have recanted their testimony, and other witnesses have implicated the State's star witness as the shooter. Justices Scalia and Thomas angrily dissented from the court's ruling, in which newly appointed Justice Sotomayor did not participate.

ARKANSAS INMATE REMOVED FROM DEATH ROW

The State of Arkansas agreed that death-sentenced inmate Sedrice Simpson is mentally retarded, and agreed to the grant of habeas relief on this basis. Simpson scored 59 on an IQ test and will be resentenced to life without parole. Habeas relief was formally granted September 16, 2009. *See Simpson v. Norris*, No. 5:04CV00429 JLH, 2009 WL 2985837 (E.D. Ark. Sept. 16, 2009).

JULIE BRAIN TO DEPART FROM ARKANSAS CAPITAL HABEAS UNIT

We are sad to report that Julie Brain, Chief of the Capital Habeas Unit of the Arkansas Federal Public Defender, will be leaving the office to take a similar position in Delaware. Ms. Brain has served as Chief of the CHU since its founding. Recent years have witnessed an enormous improvement in the quality of representation in Arkansas' capital habeas cases. Ms. Brain's many accomplishments include building a staff that is able and qualified to continue the office's fine efforts. The CHU will be promoting from within, and attorney Scott Braden will take over as chief.

SO FAR SO GOOD

In her first ruling in a death penalty case, newly confirmed Justice Sonia Sotomayor voted with Justices Stevens, Ginsburg and Breyer to stay the execution of Ohio inmate Jason Getsy, whose challenge to that state's lethal injection procedures was held time-barred by Sixth Circuit. The remaining five justices denied the stay and other relief, and Mr. Getsy was executed August 18, 2009.

THE PRICE OF LIBERTY

Media reports from August state that Thomas McGowan stands to receive $1.8 million from the State of Texas. McGowan was exonerated by DNA evidence after spending 23 years in prison for a rape and robbery that he didn't commit. A Texas statute provides for an award of $80,000 for every year that an exonerated inmate was incarcerated. Later, on August 10, 2009, the Fifth Circuit upheld, by an equally divided vote of the court en banc, a $14.1 million award to exoneree John Thompson, who spent 14 years on death row until he was freed through a *Brady* claim. *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009). Still later in August, the First Circuit upheld a judgment of $102 million based on the FBI's withholding of evidence that could have freed four men who were imprisoned for a murder they didn't commit. *Limone v. United States*, — F.3d —, Nos. 08-1327, 08-1328, 2009 WL 2621536 (1st Cir. Aug. 27, 2009).

But here in Missouri we value liberty less extravagantly. Joseph Amrine spent seventeen years on Missouri's death row for a murder he didn't commit—thanks to the State's suppression of the threats and favors it gave to the purported eyewitnesses who testified at Mr. Amrine's trial, who later recanted their testimony. Missouri provides no statutory remedy for exonerees such as Mr. Amrine. When Mr. Amrine sued the officers and prosecutors who put him on death row, he was not allowed even to present his case to a jury. *Amrine v. Brooks*, 522 F.3d 823 (8th Cir. 2008). And worse than giving him nothing at all, the State and its agents—who were held to be immune from suit—moved for and obtained an award of court costs ordering Mr. Amrine to pay over $28,000. Let freedom ring!

IN THIS ISSUE

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NORTH CAROLINA ENANORTH CAROLINA ENACTS RACIAL JUSTICE ACT

North Carolina's governor signed into law the Racial Justice Act on August 11, 2009. The Act allows pretrial defendants as well as those already sentenced to death to challenge the application of the death penalty through the use of statistical studies. If a defendant or prisoner proves racial bias, a court may overturn a death sentence or prevent prosecutors from seeking the death penalty.

DID TEXAS EXECUTE AN INNOCENT MAN?

An expert consultant retained by the Texas Commission on Forensic Science concluded in late August that Cameron Willingham, who was executed by Texas in 2004 for the arson felony-murder of his three young children, was convicted based on expert testimony inconsistent with accepted principles of fire science. There was in fact no credible evidence that the fire was caused by arson. "A finding of arson could not be sustained based upon the standard of care expressed by fire investigation texts" at the time, or now, the expert concluded. Willingham had consistently maintained his innocence. The evidence of Willingham's innocence received national attention in a full-length article in the September 7 issue of *The New Yorker*: "Trial By Fire: Did Texas Execute an Innocent Man?," by David Grann. The Death Penalty Information Center has posted both the expert report and the New Yorker article on its website: www.deathpenaltyinfo.org.

OHIO BOTCHES LETHAL INJECTION

After trying for more than two hours on September 15 to insert an intravenous line, the State of Ohio postponed the execution of Romell Broom. It was the third time in three years that Ohio has had serious difficulties administering a lethal injection. Governor Ted Strickland initially granted a seven-day reprieve. Broom's legal team filed a complaint under 42 U.S.C. § 1983 in federal district court alleging Eighth Amendment violations, and also sought relief in the Ohio and U.S. Supreme Courts. The State stipulated to a temporary restraining order prohibiting another attempt to execute Broom until September 28. On September 22, without objection from the State, the TRO was extended until November 30, and the district court hearing on Broom's motion for preliminary injunction was reset for November 30. *Broom v. Strickland*, No. 2:09-cv-823 (S.D. Ohio). Legal pleadings and press coverage are available at www.lethalinjection.org, the website maintained by the Death Penalty Clinic at UC Berkeley School of Law. [PILC thanks the California Appellate Project for permission to reproduce portions of CAP's publication, *Recap*, concerning the above developments in Texas and Ohio].

CHANGES TO FEDERAL RULES

Effective December 1, 2009, the Federal Rules of Civil Procedure will now count as "days" the weekends and holidays during a filing deadline. Under the current version of Rule 8, for example, a ten-day period would omit intervening weekends so that it would effectively be a fourteen day period. The amended Rule 8 erases this constant source of confusion. At the same time, various filing deadlines are extended by amendments to the rules of civil and appellate procedure. Most importantly, a motion to alter or amend a judgment must be filed within 28 days of the judgment under the amended Rule 59(e), compared to ten days under the current rule. Likewise, a Rule 60(b) motion will toll the deadline for filing a notice of appeal if the motion is filed within 28 days of judgment. *See* Amended Fed. R. App. P. 4(a)(4)(A)(vi).

A more ominous development is the amendment to Rule 11 of the Rules Governing Section 2254 and Section 2255 cases. Under amended Rule 11(a), a district court that denies habeas relief *must* either grant or deny a certificate of appealability at the same time as it issues an order denying habeas. The court may, but need not, ask for briefing on the COA question "before entering the final order." The new rule does not preclude a party from seeking reconsideration of the denial of a COA, but such a motion "does not extend the time to appeal." Amended Rule 11(a) is problematic: it all but requires the district court to decide whether to grant or deny a COA before the court has had the benefit of hearing why its reasons for denying a particular claim are "debatable." *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("The petitioner must demonstrate that reasonable jurists would find *the district court's assessment* of the constitutional claims debatable or wrong.") (emphasis added). Of course, a petitioner remains able to seek a COA from a court of appeals if the district court has denied one.

U.S. SUPREME COURT RECENT DECISIONS

In re Davis, — S. Ct. —, No. 08-1443, 2009 WL 2486475 (Aug. 17, 2009). In this Georgia capital case brought under the Supreme Court's original habeas jurisdiction, the court ordered the district court to take testimony and make findings as to whether "evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." Justice Stevens issued a lengthy concurrence in order to answer Justice Scalia's angry dissent. Justice Stevens did not definitively opine as to whether habeas relief could be granted to a death-sentenced prisoner on a free-standing claim of innocence, but he described the strong evidence of Davis's innocence and urged that the district court could consider the availability of relief, the applicability of AEDPA, the constitutionality of any limits AEDPA might impose on the

claim, and other questions. Justice Scalia, joined only by Justice Thomas, decried the "fool's errand" of sending the case to the district court. He reiterated his view that the Constitution permits the execution of an innocent person who received a fair trial. Justice Sotomayor did not participate in the case.

CERT GRANTED

Berguis, Warden, v. Thompkins, No. 08-1470 (granted Sept. 30, 2009). The court granted certiorari on the following questions:

1) Whether the Sixth Circuit expanded the *Miranda* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them, and

2) Whether the Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. §2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of Thompkins' guilt allowed the State court to reasonably reject the claim.

Berguis, Warden, v. Smith, No. 08-1402 (granted Sept. 30, 2009). The court granted certiorari to consider whether the Sixth Circuit erred in concluding that the Michigan Supreme Court failed to apply "clearly established" Supreme Court precedent under 28 U.S.C. § 2254 on the issue of the fair cross-section requirement under *Duren v. Missouri*, 439 U.S. 357 (1979), where the Sixth Circuit adopted the comparative-disparity test (for evaluating the difference between the numbers of African- Americans in the community as compared to the venires).

Carr v. United States, No. 08-1301 (granted Sept. 30, 2009). The court will decide whether the Ex Post Facto clause precludes a prosecution under the Sex Offender Registration and Notification Act, for failing to register as a sex offender after moving to a new state, when the sex offense and the interstate travel occurred before the statute's enactment. The court will also decide whether the statute itself applies retroactively, so it might not reach the constitutional issue.

United States v. O'Brien, No. 08-1569 (granted Sept. 30, 2009). The court will consider whether the mandatory sentence enhancement under 18 U.S.C. § (c)(1), which increases the sentence beyond the 30-year minimum when the firearm is a "machine gun," is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by the preponderance of the evidence.

EIGHTH CIRCUIT DECISIONS

United States v. Rodriguez, — F.3d —, No. 07-1316, 2009 WL 2998103 (8th Cir. Sept. 22, 2009). The Eighth Circuit affirmed the conviction and death sentence imposed in this case involving the notorious kidnapping and murder of Dru Sjodin. The majority rejected a wide variety of claims, including venue, jury selection, evidentiary errors, the applicability of the statutory aggravating circumstance for multiple prior convictions involving "serious bodily injury," and numerous claims of prosecutorial misconduct on closing argument. On the aggravator issue, the court held that the language in 18 U.S.C. § 3592(c)(4) allows a court to consider matters beyond the record of the conviction, that the issue of whether the aggravator is satisfied should be decided by a jury, and that "serious bodily injury" can be shown by evidence of severe or long-term psychological trauma even without a diagnosis of PTSD or a similar disorder. The court's ruling in this regard made it permissible for the government to present testimony from the victims of decades-old sexual assaults, including psychological impacts occurring after the convictions were entered. Judge Melloy dissented on the misconduct issue and would have reversed the death sentence based on the cumulative effect of the prosecutor's improper arguments. Chief among these was the prosecutor's false statement that the sentence for kidnapping alone would have been life imprisonment, and therefore, that the jury should tell the defendant, through a death verdict, that "Dru Sjodin was not a freebie." The Government also argued that the defense's mitigation case amounted to "put it up [and] hope it sticks," that the prosecutor himself "speaks for" Dru Sjodin and that the jury should imagine the terror in her mind as she was being murdered, and that various mitigating factors should not be weighed because they did not minimize the offense.

Wooten v. Norris, 578 F.3d 767 (8th Cir. 2009). In this unfortunate capital case from Arkansas, the Eighth Circuit affirmed the denial of habeas relief to Jimmy Don Wooten. The court held that Wooten procedurally defaulted his claims that trial counsel was ineffective for not developing mental health and social history evidence to show that he lacked the *mens rea* for first degree murder during the guilt phase, and for not developing and presenting this same evidence during the penalty phase. The evidence included a showing that Wooten had been brutally abused by his father and suffered from post-traumatic stress order and organic brain damage. At trial, by contrast, the entirety of counsel's penalty-phase

presentation took up ten pages of the transcript, including opening and closing arguments.

The Eighth Circuit rejected a number of arguments that Wooten's claims and evidence could be considered on habeas. First, Wooten's post-conviction counsel had been disbarred because of his criminal convictions, was not validly practicing law at the time he represented Wooten, and did not disclose this impairment to the Wooten family or the court. The Eighth Circuit nevertheless held, citing *Coleman v. Thompson*, 501 U.S. 722, 753-54 (1991), that these facts cannot create "cause" to excuse post-conviction counsel's abject failure to present the IAC claims—even though "counsel" was not in reality a lawyer. The court also rejected Wooten's argument that he was innocent of the death penalty under *Sawyer v. Whitley*, 505 U.S. 333 (1992). It deferred to the district court's ruling that the mental health evidence did not necessarily disprove the aggravating circumstance that Wooten "knowingly" created a great risk of death to someone other than the murder victim. The district court rejected Wooten's experts' testimony, in light of Wooten's ability to complete high school, attend college, and avoid criminal activity. The Eighth Circuit held that this ruling "was not clearly erroneous." Third, the court rejected Wooten's argument that he preserved the habeas claims by filing a motion to recall the mandate in the Arkansas Supreme Court. The Eighth Circuit held that the remedy is narrow, and that the state court's occasional grants of relief, *ex gratia*, for blatantly ineffective post-conviction counsel, does not open the door to federal relief as a matter of course. The lead opinion and Judge Bright's concurrence both encourage the Arkansas Supreme Court to grant such relief to Mr. Wooten, whose motion to recall the mandate apparently remains pending.

Williams v. Norris, 576 F.3d 850 (8th Cir. 2009). In this capital case from Arkansas, the Eighth Circuit reversed the district court's grant of penalty phase relief to Marcel Williams, while affirming the denial of guilt phase relief. The court chided the district court for holding an evidentiary hearing on the claim without examining the limitations in 28 U.S.C. 2254(e)(2). It also rejected Williams' argument that the State waived the issue by not objecting to a hearing below. The Eighth Circuit ruled that the State adequately objected by arguing, in response to an earlier motion by Williams seeking more time to file an amended petition, that a federal habeas proceeding does not provide "an opportunity to retry the case." Alternatively, the Eighth Circuit held that it would exercise its discretion to enforce section 2254(e)(2) even without an objection from the State. In Williams' case, the federal hearing presented evidence that he suffered from post-traumatic stress disorder as a result of physical, sexual, and psychological abuse, including accounts of his being intentionally burned by his mother, being "pimped out" to older women from the age of ten, and being neglected in a "roach infested" home of alcoholics. The Eighth Circuit limited its consideration of the claim to the relatively threadbare evidence presented on state post-conviction review. Because that evidence did not explain any mental health diagnosis or its factual underpinnings, the Eighth Circuit held that the Arkansas Supreme Court did not unreasonably reject the claim. The Eighth Circuit went on to reject numerous guilt-phase claims, including *Batson*, jury selection, *Miranda*, and various challenges to Arkansas' capital sentencing scheme.

Ward v. Norris, 577 F.3d 925 (8th Cir. 2009). By a vote of 2-1, the Eighth Circuit affirmed the denial of habeas relief to Arkansas capital inmate Bruce Ward. When Ward's Eighth Circuit appeal was initially pending following the district court's denial of relief, newly appointed counsel moved for relief from judgment under Rule 60(b), arguing that Ward was mentally incompetent to proceed on habeas review, and that his habeas proceedings should have been stayed under the reasoning of *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), until his competency could be restored. Relying on *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Eighth Circuit held that the Rule 60(b) motion was effectively a successive petition because initial habeas counsel was at fault for not seeking a stay himself despite filing a motion for expert and investigative services and alleging that his client was actively psychotic. The court also reasoned that the motion was successive because it "ultimately" sought to develop and present additional claims for relief. Judge Melloy dissented on the 60(b) issue, observing that *every* Rule 60(b) motion filed in a habeas case has the ultimate objective of relief from the prisoner's conviction or sentence. The dissent also argued that the case should be remanded to the district court for a hearing because it was not clear whether the issue of Ward's incompetence went unasserted through previous counsel's failures rather than the mental illness itself. Among other things, Ward believed that habeas counsel was in league with a conspiracy of state actors who had framed him for murder, and he ceased cooperating with counsel when he learned of counsel's motion for investigative and expert funding.

Taylor v. Roper, 577 F.3d 848 (8th Cir. 2009). In yet another problematic *Batson* ruling from our circuit, the court affirmed the denial of habeas relief to Missouri death row inmate Leon Taylor. The prosecution removed three African-American venirepersons from Taylor's initial jury. A second jury considered only the issue of punishment, and the State struck all four black panelists from the final jury and both blacks from the group of potential alternates. The Eighth Circuit's opinion systematically analyzes each of the nine relevant strikes and explains why, in the court's view, the state courts permissibly upheld each strike.

An extended discussion of the specifics is beyond the scope of this newsletter, but several aspects of the court's reasoning bear separate mention. First, the court repeatedly observed that because the ultimate issue of discrimination under *Batson* is a factual question, a petitioner cannot prevail unless the

state court's reasoning is *both* (a) disproven by clear and convincing evidence under 28 U.S.C. § 2254(e)(1), and (b) unreasonable in either fact or law under 28 U.S.C. § 2254(d)(1)-(2). The court's holding is at odds with *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) ("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires."). It also conflicts with the views of other circuits considering *Batson* claims on habeas review. *See Kesser v. Cambra*, 465 F.3d 351, 358 n.1 (9th Cir. 2006); *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252, 1266 (11th Cir. 2009). Finally, the interplay between subsections (d) and (e) of § 2254 is now being considered by the Supreme Court in *Wood v. Allen*, No. 08-9156.

Second, the court reiterated its precedent that a trial court's unexplained denial of a *Batson* challenge must be deemed an "implicit" finding that the prosecutor's race-neutral explanations were credible. *See Smulls v. Roper*, 535 F.3d 853, 860 (8th Cir. 2008). This holding, too, is problematic. *See Snyder v. Louisiana*, 128 S. Ct. 1203, 1209 (2008) (declining to credit the prosecutor's demeanor-based explanation for a strike, because the trial court simply ruled "I'm going to allow the challenge" and did not expressly credit the prosecutor's explanation).

Third, the court repeatedly rejected arguments that the stricken black jurors were "similarly situated" to white panelists who were not stricken. Faced with numerous sets of comparable but non-identical jurors who were gave comparable but non-identical responses on voir dire, the court in each instance credited the prosecutor's claimed reliance on subtle—if indeterminable—differences. *Compare Taylor*, 577 F.3d at 866 ("Attorneys often make distinctions between prospective jurors based on instincts formed by limited information, and substantial grounds for distinguishing among jurors are not always available . . . Even fine race-neutral distinctions between them are a permissible basis for strikes."), *with Miller-El v. Dretke*, 545 U.S. 231, 247 n.6 (2005) ("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.").

Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009). The Eighth Circuit upheld the grant of habeas relief in this Minnesota case of a defendant convicted of molesting his three-year-old nephew. The trial court ruled the child incompetent to testify. In his stead, the court admitted a videotaped interview of the child, taken by a social worker whom police requested, as well as the testimony of the social worker. The Eighth Circuit held that the evidence was "testimonial hearsay" under *Crawford v. Washington*, 514 U.S. 36 (2004), and its admission violated the Confrontation Clause. The court also held that the Minnesota Supreme Court unreasonably applied *Crawford* in ruling otherwise. The state court had reasoned that the primary purpose of the social worker's interview, taken under a state statute, is to protect children rather than obtain evidence for prosecution. Judge Bye's opinion observed that the interview—taken five days after the alleged victim reported the abuse to his mother—was not intended to protect the child from any imminent danger. Rather, "the interview consisted of highly structured questioning, aimed at getting TB to repeat, on videotape, his allegation of abuse."

MISSOURI SUPREME COURT DECISIONS

State ex rel. Winfield v. Roper, — S.W.3d —, No. SC88942, 2009 WL 2762454 (Mo. banc Sept. 1, 2009). The Missouri Supreme Court denied habeas corpus relief to John Winfield, who alleged that the bailiff told the jurors to keep deliberating at a time that the jurors were split in their penalty phase vote and either at or near an impasse. Four jurors testified to such effect, but the court deferred to a special master's findings, which credited the contrary testimony of five other jurors as well as the bailiff.

Merriweather v. State, — S.W.3d —, No. SC89846, 2009 WL 2762467 (Mo. banc Sept. 1, 2009). A unanimous court affirmed the grant of post-conviction relief in this forcible sodomy case. The issue was whether the prosecution violated *Brady* by not discovering, and then disclosing, the complaining witness's prior convictions from Illinois. The Court reserved the question of whether *Brady* extends to a prosecutor's search for convictions in another state. It nevertheless ruled that Merriweather was entitled to relief because the prosecution's lack of diligence violated Rule 25.03, which imposes an "affirmative duty to take action to discover information which it does not possess." In granting a new trial, the court observed that the trial verdict hinged entirely on whether the jury found Merriweather or the alleged victim to be more credible.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Nash v. Ryan, — F.3d —, No. 06-99007, 2009 WL 2902088 (9th Cir. Sept. 11, 2009). The Ninth Circuit extended the rationale of its previous opinion in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), to capital habeas appeals. Thus, when a death-sentenced prisoner is appealing the denial of habeas relief, and is mentally incompetent, he or she is entitled to a stay of the proceedings, at least when the case presents one or more claims that could potentially benefit from the prisoner's competent input. As in *Rohan*, the court based its ruling on a death-sentenced petitioner's statutory right to counsel, which encompasses "meaningful assistance" on a habeas appeal. Even when the appeal is based on the

district court record, "counsel may nonetheless need to communicate with his client to understand fully the significance and context of [historical] facts so that he may pursue the most persuasive arguments on appeal." The court therefore directed the district court to conduct a hearing on Nash's competence.

Schad v. Ryan, — F.3d —, No. 07-99005, 2009 WL 2902084 (9th Cir. Sept. 11, 2009). In this capital habeas appeal, the Ninth Circuit reversed the district court's ruling that the petitioner was undiligent in state court while trying to develop the mitigating evidence underlying his penalty phase IAC claim, and thus, was precluded from obtaining an evidentiary hearing under 28 U.S.C. § 2254(e)(2). The court faulted the district court for relying on the fact that the evidence *hadn't been* developed despite the several years the post-conviction action was pending, but without examining whether the petitioner was nevertheless sufficiently "diligent" in light of the fact that his family members did not cooperate with PCR counsel's investigation. The court therefore remanded for a hearing to determine whether Schad had been sufficienty diligent.

Thomas v. Horn, 570 F.3d 105 (3rd Cir. 2009). In this capital habeas appeal, the Third Circuit affirmed the district court's denial of guilt phase relief, but vacated the grant of penalty phase relief on the sparse record before it, and remanded for an evidentiary hearing. Thomas's attorneys presented no mitigation at trial. When inartfully questioned by the trial judge, Thomas appeared to concur with the decision not to present any mitigation, but it was unclear from the transcript whether he was being asked about not testifying in the penalty phase or about presenting no mitigating evidence at all.

The Third Circuit made a number of important observations in the course of its opinion. First, it held that a number of Thomas's claims were not "adjudicated on the merits" under 28 U.S.C. § 2254(d), because only the trial court had ruled on the merits, and the Pennsylvania Supreme Court rejected them on inadequate procedural grounds. The claims were therefore subject to *de novo* review. Second, as to Thomas's IAC claim, the Third Circuit ruled that Thomas did not "fail to develop" the evidence in state court so as to preclude a hearing under 28 U.S.C. § 2254(e)(2). Thomas requested a hearing in state court but was denied one. Third, the court was unable to affirm the grant of penalty phase relief without a hearing. Although the record strongly suggested that trial counsel performed little or not penalty phase investigation, counsel's testimony was required. Fourth, the court ruled that the undiscovered mitigating evidence—including a long history of mental illness, symptoms of schizophrenia during Thomas's youth, and an "extreme mental or emotional disturbance" at the time of the crime—would, if proven, establish *Strickland* prejudice despite the brutal murder at issue.

Moore v. Quarterman, No. 05-70038, 2009 WL 2573295 (5th Cir. Aug. 21, 2009) (unpublished). The Fifth Circuit upheld the district court's determination that the petitioner is mentally retarded under *Atkins*. Particularly noteworthy is the court's analysis of Moore's deficits in adaptive functioning, together with his IQ scores of 76, 74 and 66. The court upheld the district court's acceptance of a "standard error of measurement" of five points. More importantly, the court upheld the district court's ruling that Moore suffered from "significant limitations in . . . effectiveness in meeting the standards of maturation, learning, personal independence, and/or social responsibility that are expected for his or her age level and cultural group." The district court credited the prisoner's expert over the State's, in part, because Moore's expert spent more time evaluating him and interviewing his family members. The evidence showed that Moore was unable to dress himself or tie his shoes, consistently scored below his grade level, and had difficulties learning to speak in sentences. The district court also credited Moore's expert's testimony that his finding of mental retardation would not be changed by evidence that Moore was the "leader" of the underlying crime.

Wilson v. Workman, 577 F.3d 1284 (10th Cir. 2009). Sitting en banc, a sharply divided Tenth Circuit ruled that an IAC claim is not "adjudicated on the merits" under 28 U.S.C. § 2254(d), and is subject to de novo review on broader evidence in federal court, when the Oklahoma Court of Criminal Appeals has reviewed the claim solely on the trial record and refuses to consider non-record evidence or order a hearing on it during the direct appeal.

Fairchild v. Workman, — F.3d —, No. 06-6327, 2009 WL 2710320 (10th Cir. Aug. 31, 2009). The Tenth Circuit expressed grave skepticism as to whether the Oklahoma rule generally requiring an IAC claim to be presented on appeal is "adequate" to bar federal relief, at least in the absence of a procedural opportunity to prove the facts underlying the claim. The court went on to conclude that the State hadn't shown that its courts consistently and even-handedly apply the rule, and thus, that no "adequate" state rule barred habeas review. [Note: Similar reasoning might be applied to Nebraska's similar rule, as described in the *Dunster* case below].

Muhammad v. Kelly, 575 F.3d 359 (4th Cir. 2009). The Fourth Circuit upheld the denial of habeas relief in the notorious "D.C. Sniper" case out of Virginia. The court rejected a variety of *Brady* claims concerning ballistics evidence and Muhammad's role in various shootings. It remarked that the State's actions were "not admirable" but did not violate the Constitution or prejudice Muhammad. The court next rejected numerous IAC claims, including a claim that counsel should have objected when Muhammad moved to represent himself, based on counsel's knowledge of Muhammad's brain damage and history of schizophrenia and bipolar disorder. The Fourth Circuit held that Muhammad

was not prejudiced by any such failure, because, during the two days that he represented himself at trial, there was no known evidence presented by the State that counsel could have excluded. The court also upheld the district court's refusal to accord Muhammad the entire 365 day period to file his habeas petition under AEDPA. Muhammad sought leave to amend his petition a second time, but before the one-year deadline had passed. The Fourth Circuit was skeptical of Muhammad's argument that a district court must allow a prisoner the entire limitation period but ruled that Muhammad had not shown any prejudice from his inability to file a second amended petition.

Ali v. Hickman, 571 F.3d 902 (9th Cir. 2009). The Ninth Circuit granted relief in this non-capital California murder case, finding that the prosecution violated *Batson v. Kentucky* by removing two African-American prospective jurors. Before examining the merits of petitioner's claim, the court established that §2254(d)(2) "governs our review of the state appellate court's finding that the prosecutor did not engage in purposeful discrimination." In footnote 4, the court, relying on *Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004), and *Kesser v. Cambra*, 465 F.3d 351, 358 n.1 (9th Cir. 2006), added that "§2254(d)(2), rather than §2254(e)(1), governs our review of a state court's factual determination of the presence or absence of discriminatory animus where our review is based entirely on information that was contained in the state court record." Otherwise stated, a petitioner who shows that the state court's rejection of the claim was "unreasonable" under § 2254(d)(2), need not *also* demonstrate intentional discrimination by "clear and convincing evidence" under § 2254(e)(1).

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

Piper v. Weber, 771 N.W.2d 352 (S.D. 2009). The South Dakota Supreme Court vacated Briley Piper's death sentence on state habeas review. Piper pleaded guilty to first degree murder on the advice of counsel, who erroneously told him that sentencing would be performed by the judge if he pleaded guilty. Piper later waived his right to jury sentencing. The trial judge explained to Piper that a jury's sentencing verdict must be unanimous, but the judge did not specifically say that a single juror's vote for life would result in a life sentence—a significant feature of the statute that "cannot be underplayed." The Supreme Court therefore held that Piper's waiver of jury sentencing wasn't knowing and voluntary. It ordered a new penalty phase before a jury.

State v. Lotter, 771 N.W.2d 551 (Neb. 2009). The Nebraska Supreme Court denied post-conviction relief to capital inmate John Lotter despite his co-defendant's affidavit recanting substantial portions of his trial testimony. The co-defendant, Marvin Nissen, was spared the death penalty in return for his testimony at Lotter's trial. The affidavit stated that it was Nissen, and not Lotter, who actually fired the fatal shots—contrary to the trial testimony and the resulting critically acclaimed (but counter-factual) movie *Boys Don't Cry*. In an earlier post-conviction proceeding, Lotter called Nissen as a witness, but Nissen took the Fifth. In the current proceeding, the Supreme Court held that Lotter procedurally defaulted his claim that the prosecution knowingly presented perjured testimony. Although Nissen's affidavit was newly-discovered, the court reasoned, the other evidence Lotter relied on to show that the prosecutors knew of the perjury—including Nissen's false statements in another case as well as his reputation for being untruthful—were either known to Lotter or discoverable during his first post-conviction proceeding (never mind that he lacked the evidence to prove perjury at that time). The court also rejected a freestanding claim of innocence, finding that Lotter was sufficiently involved in the murder to be convicted, even if the affidavit is true. The court likewise rejected Lotter's claim that the use of perjured testimony itself required relief. Surveying the conflicting authority among the lower federal courts, the court ruled that perjured testimony alone does not violate the Constitution, and that relief on a second post-conviction motion requires an error of constitutional magnitude.

State v. Dunster, 769 N.W.2d 401 (Neb. 2009). The Nebraska Supreme Court affirmed the denial of post-conviction relief to death-sentenced prisoner David Dunster, who proceeded pro se for most of his trial and was represented by "stand by" counsel. The court ruled that the bulk of Dunster's IAC claims were procedurally defaulted because Dunster could have presented them on direct appeal. The court reaffirmed its precedent holding that a prisoner is required to raise any IAC claims on direct appeal if the claims are either "known to the defendant" or "apparent from the record." The rule applies unless trial counsel represents the prisoner on direct appeal, which wasn't the case for Dunster.

Cooke v. State, 977 A.2d 803 (Del 2009). In this unusual direct appeal, the Delaware Supreme Court vacated the conviction and death sentence of a defendant who insisted he was innocent, but whose lawyers insisted that he was "guilty but mentally ill." Among other problems, trial counsel presented the defendant's otherwise privileged confession to a therapist, argued that the defendant committed the murder, and refused to call the defendant as a witness (he was examined by the trial judge instead). Cooke repeatedly objected to his lawyers' strategy, but the trial judge failed to inquire into the conflict. Reversing, the Supreme Court held that Cooke was denied his rights to plead not guilty, to testify in his own defense, and to have a jury determine his guilt or innocence. The court also granted relief under *United States v. Cronic*, 466 U.S. 648 (1984), holding that counsels' conduct and the trial court's inaction "undermined the proper functioning of the adversarial process contemplated by the Sixth Amendment and the Due Process Clause."

State v. Locklear, 681 S.E.2d 293 (N.C. 2009). The North Carolina Supreme Court held that, at the request of the defendant, a jury considering whether a capital defendant is mentally retarded must be instructed that the defendant will be sentenced to life without parole if so found. The court therefore reversed for a new hearing.

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