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NOTEWORTHY NEWS

THREE PUZZLING SCOTUS OPINIONS ON PENALTY PHASE IAC CLAIMS

In three cases described in this edition, the Supreme Court summarily reversed three lower court rulings on claims of penalty phase IAC. The court reversed grants of habeas relief from the Sixth and Ninth Circuits, while reversing a denial of relief from the Eleventh Circuit. *See Bobby v. Van Hook*, 130 S. Ct. 13 (2009); *Wong v. Belmontes*, 130 S. Ct. 383 (2009); *Porter v. McCollum*, 130 S. Ct. 447 (2009). In *Van Hook*, the court criticized the Sixth Circuit for holding counsel from a 1985 trial to the 2003 ABA Guidelines, including the requirement that counsel interview "virtually everyone who knew the defendant and his family." In *Belmontes*, the court rejected the argument that the defendant was prejudiced by failings in counsel's penalty phase investigation. The court troublingly held that the missing evidence was largely "cumulative" of the "substantial" trial mitigation, and more troublingly, the court signaled its doubt as to *what* evidence might mitigate the senseless—but hardly unusual—murder at issue. Nevertheless, only two weeks later, the Court in *Porter* reversed the Eleventh Circuit's denial of relief. In *Porter*—a double-murder case—counsel failed to follow up on pretrial competency evaluations and otherwise to interview readily available witnesses, and thereby failed to discover evidence that Porter served heroically in the Korean War, suffered long-term PTSD and substance abuse as a result, and had been physically abused as a child some five decades before the crime. *Van Hook* and *Belmontes* might have signaled the Court's retreat from *Wiggins v. Smith*, 539 U.S. 510 (2003), but *Porter* substantially eases such concerns.

All three opinions were unanimous, but they are difficult to reconcile with each other. Commentator Linda Greenhouse has justly criticized the court's "selective empathy." *See Selective Empathy*, Opinionator Blog, New York Times, Dec. 3, 2009:

> Am I glad that a hapless 77-year-old man won't be put to death by the State of Florida? Yes, I am. Am I concerned about a Supreme Court that dispenses empathy so selectively? Also yes.

EIGHTH CIRCUIT UPHOLDS MISSOURI LETHAL INJECTION METHOD; EXECUTIONS STILL ON HOLD, FOR NOW

On November 10, 2009, the Eighth Circuit affirmed the grant of judgment on the pleadings against claims brought by numerous death row prisoners, targeting Missouri's history of employing unqualified and incompetent execution personnel. *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009). A more detailed discussion of the *Clemons* opinion appears below. Following the issuance of *Clemons*, a spokesperson for the Missouri Supreme Court stated that the court is unlikely to set any execution dates until the federal courts have reached a "final decision in the case." *See "Missouri: Panel Rejects Challenge of Execution Team,"* Joplin Globe, Nov. 11, 2009.

OTHER LETHAL INJECTION DEVELOPMENTS

Following its botched attempt to execute Romell Broom, the State of Ohio became the first state to draft and implement a "one-drug protocol" for lethal injections. The protocol actually consists of two parts: So-called "Plan A" consists of a massive and theoretically lethal dose of sodium thiopental. If that doesn't kill the inmate, then "Plan B" involves the intra-muscular injection of hydromorphone and midazolam – an untested and slow-acting combination that is illegal for euthanizing animals in Ohio. Ohio executed Kenneth Biros on December 9, without resorting to "Plan B.

IN THIS ISSUE

Noteworthy News 1
U.S. Supreme Court Decisions 2
Cert Granted 4
Cert Denied 4
Eighth Circuit Decisions 4
Missouri Supreme Court Decisions 6
Significant Decisions from Other Circuits 7
Significant Decisions from Other State Courts 8

In Arkansas, the state Supreme Court upheld a statute exempting the lethal injection protocol from the Administrative Procedure Act. *Arkansas Dept. of Corrections v. Williams*, — S.W.3d —, No. 08-1031, 2009 WL 4545103 (Ark. Oct. 29, 2009). The State has sought execution dates against three prisoners, but no executions have been scheduled as of now.

Meanwhile, in Kentucky, a bitterly divided Supreme Court held that the Commonwealth's lethal injection protocol is an "administrative regulation" under state law, and must be enacted through notice-and-comment rulemaking. *See Bowling v. Kentucky Dept. of Corrections*, — S.W.3d —, No. 2007-SC-000021-MR, 2009 WL 4117353 (Ky. Nov. 25, 2009). That process is not likely to be completed until at least May 2010. According to press reports, the Department of Corrections intends to retain its three-drug protocol of sodium thiopental, pancuronium bromide, and potassium chloride.

MISSOURI SUPREME COURT INVALIDATES PUBLIC DEFENDER RULES; CASELOAD CRISIS REMAINS

In *State ex rel. Missouri Public Defender Commission v. Pratte*, — S.W.3d —, Nos. SC 89882, SC 90195, 2009 WL 4638864 (Mo. Dec. 8, 2009), the court invalidated two portions of regulations issued by the Public Defender Commission, allowing public defender offices to refuse certain types of cases when caseloads become unmanageable. The court acknowledged Missouri's crisis in providing effective indigent defense services, but the solution to that crisis remains unclear. A recent analysis concludes that Missouri's criminal justice system "is heading for disaster, one which is both predictable and preventable." Governor Jay Nixon, for his part, recently vetoed legislation to allow the Public Defender Commission to limit its caseload, citing concerns that crime victims might have to "wait for justice." Meanwhile, the Governor slashed by 75 percent the $2 million in federal stimulus money that Missouri's public defenders were set to receive.

AMERICAN LAW INSTITUTE DISAVOWS CAPITAL PUNISHMENT

On October 23, 2009, the American Law Institute formally voted to withdraw its "model" death penalty statute from the Model Penal Code, in light of "the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." The development is particularly significant because the ALI's model statute served as the basis for the Georgia statute that the Supreme Court upheld in *Gregg v. Georgia*, 428 U.S. 153 (1976), which effectively reinstated the death penalty in the United States.

DEATH SENTENCES DECLINE, AGAIN

According to the Death Penalty Information Center's annual report for 2009, this year witnessed only 109 new death sentences being imposed. That figure represents the lowest since the death penalty was reinstated in 1976. It is considerably below the average of 295 death sentences per year during the 1990s. Even in Texas, the numbers are staggeringly low by historical standards. Harris County (Houston) has not imposed a death sentence in the last two years, and in all of Texas, only nine death sentences were handed down in 2009. In Missouri, two defendants were sentenced to death this year: Lance Shockley and Gregory Bowman.

U.S. SUPREME COURT RECENT DECISIONS

Bobby v. Van Hook, 130 S. Ct. 13 (2009) (per curiam). The Supreme Court summarily reversed the Sixth Circuit's grant of habeas relief in this Ohio capital case. On the issue of trial counsels' mitigation investigation, the court criticized the Sixth Circuit for relying on the 2003 ABA Guidelines. Van Hook was tried in 1985, or before even the 1988 Guidelines on which the Supreme Court relied in *Wiggins v. Smith*, 539 U.S. 510 (2003). Counsel, thus, were not bound by the 2003 directives that attorneys must fully investigate the defendant's life "from the moment of conception" and contact "virtually everyone who knew the defendant and his family." [Editor's note: If not for the Supreme Court's decision in *Porter* a few weeks later (see below), these observations might portend the court's retreat from *Wiggins*, which requires counsel to seek out "all reasonably available mitigating evidence."]. The court next criticized the Sixth Circuit's inflexible application of the Guidelines. It emphasized that *any* ABA Guidelines are merely "guides to what reasonableness means," and cannot be used as "inexorable commands with which all capital defense counsel must fully comply." The court next held that counsel performed adequately under the standards prevailing at the time of trial. Finally, the court ruled that Van Hook was not prejudiced by any deficiencies in counsel's investigation. The mitigation evidence unearthed after trial would have added "nothing of value," the court said. For example, counsel failed to discover evidence that

Van Hook was frequently beaten by his father, who once tried to kill Van Hook's mother. The Court discounted such evidence, since the trial court already knew that Van Hook's father "had a violent nature, had attacked Van Hook's mother, and had beaten Van Hook at least once."

Wong v. Belmontes, 130 S. Ct. 383 (2009) (per curiam). In this California case, the Supreme Court summarily reversed the Ninth Circuit's grant penalty phase relief on an IAC claim. Having twice before reversed the Ninth Circuit's grant of relief on an instructional issue, the court appears to have been exasperated. *See Ayers v. Belmontes*, 549 U.S. 7 (2006); *Brown v. Belmontes*, 544 U.S. 945 (2005). The court held that Belmontes was not prejudiced by any errors in trial counsel's mitigation investigation. First, it reasoned that the evidence supporting the IAC claim would have been largely "cumulative" of the "substantial" mitigation presented at trial. Evidence of Belmontes' difficult childhood—for example, that his sister died when Belmontes was five years old and that he suffered from depression—largely duplicated the mitigation at trial. Second, the court reasoned that additional evidence of Belmontes' mental state would have "opened the door" to detailed evidence that Belmontes committed a murder in addition to the crime of his conviction. Third, the court remarked that, even without the additional murder, the case was substantially aggravated. Belmontes had killed the victim by beating her head with a dumbbell bar 15 to 20 times. Evidence also showed that Belmontes killed the victim solely to prevent her interference with a burglary that netted some $100 that Belmontes and his group used to buy beer and drugs for the night. The court observed, "It is hard to imagine expert testimony and additional facts about Belmontes' difficult childhood outweighing the facts of . . . [the] murder."

Porter v. McCollum, 130 S. Ct. 447 (2009) (per curiam). In stark contrast to the decisions in *Van Hook* and *Belmontes*, the Supreme Court summarily reversed the Eleventh Circuit's denial of penalty phase relief in this Florida capital case in which the defendant killed his ex-girlfriend and her boyfriend. Trial counsel presented scant mitigation describing Porter's behavior when intoxicated, as well as his positive relationship with his son. Counsel did not discover or present evidence that Porter was frequently abused by his father, that he served heroically in the Korean War and suffered long-term psychological trauma as a result (including PTSD that featured nightmares in which Porter would try to climb his bedroom walls with knives), that he developed a chronic drinking problem, and that he suffered from an extreme mental or emotional disturbance under Florida's statutory mitigating circumstances. On the issue of counsel's performance, the Court reviewed it *de novo* because the state courts did not reach the issue. The court ruled that counsel performed deficiently under *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003), because he interviewed no mitigation witnesses and neither requested nor obtained any records. Counsel also failed to follow up on leads contained within the court-ordered competency evaluations, which showed the Porter spent few years in regular school, served in the military, was wounded in combat, and had been "over-disciplined" by his father. Although Porter instructed counsel not to speak with his ex-wife or son, he did not otherwise limit the scope of what counsel could investigate. The court next held that the Florida Supreme Court unreasonably applied *Strickland* and *Williams* by finding an absence of prejudice. The court observed that the original judge and jury heard almost no evidence to humanize Porter, and heard nothing about his heroic service in Korea, the mental health issues that ensued, his history of child abuse, or his brain abnormalities. Also, the case was not so aggravated that the additional mitigating evidence wouldn't have mattered. The court also criticized the state courts for discounting the mental health evidence and agreeing with the state's experts that Porter was not actually under a severe mental or emotional disturbance. Even if the evidence wouldn't have satisfied the statutory mitigating circumstance, the court concluded, it was unreasonable for the state court to "discount entirely the effect that [the expert's] testimony might have had on the jury or the sentencing judge."

Beard v. Kindler, 130 S. Ct. 612 (2009). The Supreme Court held that a discretionary rule of state procedure is not "inadequate" to bar federal habeas review simply because the rule is discretionary. In this case, the prisoner escaped from custody and fled to Canada after the jury convicted him, but before the trial court formally sentenced him to death. The trial court then dismissed Kindler's post-trial claims under Pennsylvania's "escape rule," and the Pennsylvania Supreme Court reviewed only whether the conviction and sentence were adequately supported by the evidence and not the product of passion or prejudice. All of Kindler's post-conviction claims were set aside as well. On habeas review, the Third Circuit eventually granted relief on two of Kindler's claims, and held that the "escape rule" was not adequate to bar review, because the rule is discretionary. The

Supreme Court reversed and remanded, but with little additional guidance. It held that a rule may be "firmly established and regularly followed" even if it is discretionary, but the court declined to specify how "regularly" a rule may be followed in order to preclude federal review. The court likewise declined to consider Kindler's argument that the Pennsylvania Supreme Court actually fashioned a newly-announced and non-discretionary "escape rule" on Kindler's direct appeal, so that *that* rule was not "adequate." These latter issues, among others, will be considered by the Third Circuit on remand.

Corcoran v. Levenhagen, 130 S. Ct. 8 (2009). In yet another summary reversal, the Supreme Court reversed and remanded the Seventh Circuit's ruling, which reversed the district court's grant of relief on a penalty phase claim. The district court ruled only on the single claim upon which relief was granted, but the Seventh Circuit remanded with directions to deny the habeas corpus petition in its entirety. The Supreme Court ruled that the Seventh Circuit erred by not remanding for full consideration of Corcoran's other claims, or at least explaining why such review was not warranted.

CERT GRANTED

Magwood v. Culliver, — S. Ct. —, No. 09-158, 2009 WL 2421590 (U.S. Nov. 16, 2009). The Supreme Court granted certiorari to consider, "When a person is resentenced after having obtained federal habeas relief from an earlier sentence, is a claim in a federal habeas petition challenging that new sentencing judgment a 'second or successive' claim under 28 U.S.C. § 2244(b) if the petitioner could have challenged his previously imposed (but now vacated) sentence on the same constitutional grounds?" Magwood's original death sentence was vacated on habeas review, and after he was re-sentenced, he asserted a meritorious claim, newly recognized by state law, that his murder offense was not a death-eligible crime under Alabama law.

Renico v. Lett, — S. Ct. —, No. 09-338, 2009 WL 2984058 (U.S. Nov. 30, 2009). In this non-capital case, the Supreme Court will consider the question of "[w]hether the United States Court of Appeals for the Sixth Circuit, in a habeas case, erred in holding that the Michigan Supreme Court failed to apply clearly established Supreme Court precedent under 28 U.S.C. § 2254 in denying relief on double jeopardy grounds in the circumstance where the State trial court declared a mistrial after the foreperson said that the jury was not going to be able to reach a verdict."

CERT DENIED

Muhammad v. Kelly, 130 S. Ct. 541 (2009). The court denied certiorari and a stay of execution for D.C. Sniper John Allen Muhammad, who was executed by Virginia on November 10, 2009. Justice Stevens, joined by Justices Ginsburg and Sotomayor, concurred in the denial of cert, but issued a separate statement condemning "the perversity of executing inmates before their appeals process has been fully concluded." The court could have entertained Muhammad's cert petition—seeking review of the Fourth Circuit's affirmance of the denial of habeas relief—during its conference of November 24. By denying a stay, "[W]e have allowed Virginia to truncate our deliberate process on a matter . . . that deserves the most careful attention." Justice Stevens wrote that the court should adopt a practice of staying all execution dates on a prisoner's first habeas petition.

Johnson v. Bredesen, 130 S. Ct. 541 (2009). The court denied certiorari and a stay of execution to Tennessee death row inmate Cecil Johnson, who was executed December 2, 2009. Once again, Justices Stevens and Thomas expressed their bitter disagreement as to claims that a prisoner's lengthy incarceration on death row is itself "cruel and unusual punishment." Johnson was executed almost 29 years after he was sentenced to death.

EIGHTH CIRCUIT DECISIONS

McGehee v. Norris, — F.3d —, Nos. 08-1182, 08-1513, 2009 WL 4825148 (8th Cir. Dec. 16, 2009). The Eighth Circuit reversed the district court's grant of penalty phase relief in this Arkansas capital case. The district court granted the writ on a claim that the trial court erroneously excluded mitigating evidence that McGehee's father killed the family's dogs while McGehee watched. The Eighth Circuit held that the district court erred by relying on evidence not presented to the state court, in violation of 28 U.S.C. § 2254(e)(2), specifically, declarations explaining that the witness would have described how McGehee's father had slashed the dogs' throats if her testimony hadn't been stopped by the prosecution's relevance objection. The Eighth Circuit held that McGehee did not show the requisite "diligence" in

presenting the evidence in state court, based on trial counsel's failure to explain what the witness was going to say, or why any evidence about the family's dogs was relevant – and despite counsel's later explanation to the judge during juror deliberations, when counsel explained that he wanted to show that McGehee's father killed the dogs, but when counsel failed to ask the judge to recall the jury. The Eighth Circuit also ruled that the State adequately preserved its objection to the "new" evidence on habeas review, since the State generally asserted that AEDPA precludes a prisoner from presenting new evidence and generally confines a court's review to the state court record. Limiting its review to the evidence presented in state court, the Eighth Circuit held that the state courts did not unreasonably apply the *Lockett* principle by upholding the exclusion of testimony that the Eighth Circuit believed to be marginally relevant. The court also held, despite the state's status as appellant and its failure to argue harmlessness in the district court, that any error was harmless, because, in light of the gravity of the offense, which involved torturing and humiliating the victim, McGehee had not shown a "substantial and injurious" effect on the verdict under *Fry v. Pliler*, 551 U.S. 112 (2007). Under circuit precedent, the court also upheld the state court's exclusion of evidence that McGehee's three accomplices in the murder were all sentenced to life.

Clemons v. Crawford, 585 F.3d 1119 (8th Cir. 2009). A panel of the Eighth Circuit affirmed the district court's grant of judgment on the pleadings in this lethal injection challenge. In a previous case, the court upheld Missouri's lethal injection protocol as constitutional. *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007). The *Clemons* plaintiffs alleged that the protocol would not be reliably or competently implemented as written, and thus, that a prisoner faced the risk of excruciating pain during execution. The plaintiffs pointed to Missouri's previous employment of "Dr. John Doe #1," a dyslexic surgeon who could not read the dosages of the anesthetic and other drugs that he was administering, and who varied the amounts from execution to execution. Discovery also revealed that a member of the execution team is a nurse with a conviction for aggravated stalking. The court nevertheless affirmed on the basis of Chief Justice Roberts' opinion in *Baze v. Rees*, 128 S. Ct. 1520 (2008), ruling that Missouri's protocol is "substantially similar" to the Kentucky protocol upheld in *Baze*. [Editor's Note: The court did not examine whether the Roberts plurality is the controlling opinion in *Baze*, and did not explain why the "substantially similar" test applies outside the context of staying an execution; *see Baze*, 128 S. Ct. at 1537]. The court observed that Dr. Doe does not any longer assist in Missouri executions, that a nurse with a mere misdemeanor conviction cannot be assumed incompetent to administer the protocol's directives, and that the State's alleged employment of "incompetent" or "unqualified" executioners does not support the allegation that Missouri will employ such personnel in the future. The Eighth Circuit also upheld the district court's denial of further discovery. The court rejected the premise that *Baze* forbids discovery into the backgrounds of execution team members, but it ruled that judgment on the pleadings was appropriate under the circumstances at hand.

Bell v. Norris, 586 F.3d 624 (8th Cir. 2009). The Eighth Circuit affirmed the district court's rejection of Bell's *Miranda*/voluntariness-of-confession claim in this non-capital Arkansas case. In the course of its ruling, which ultimately found the voluntariness claim to be procedurally defaulted, the court observed that (a) the court may expand a certificate of appealability within the appellate opinion itself, as it did in this case in order to erase any doubt that the court could consider Bell's Fifth Amendment voluntariness claim, and (b) it is "appropriate" for a court to recognize a procedural bar when the state has not invoked it.

Burns v. Prudden, — F.3d —, No. 09-1704, 2009 WL 4825130 (8th Cir. Dec. 16, 2009). In this non-capital case from Missouri, the Eighth Circuit reversed the district court's ruling that the prisoner's petition was untimely. The court held that Burns was entitled to equitable tolling because the "extraordinary circumstance" of a change in circuit law prevented her from timely filing the petition. Specifically, the court's opinion in *Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (en banc) overruled its earlier opinion in *Nichols v. Bowersox*, 172 F.3d 1068 (8th Cir. 1999) (en banc), so that the one year deadline for filing a habeas petition begins to run when the Missouri Court of Appeals denies rehearing, in cases where the prisoner does not seek transfer to the Missouri Supreme Court. *Riddle* rejected the argument that the clock doesn't begin to run until expiration of the ninety days for seeking certiorari from the U.S. Supreme Court, since a prisoner cannot seek cert without at least seeking transfer from the Missouri Supreme Court. Because Burns filed her petition in reliance on then-applicable circuit precedent, she was entitled to equitable tolling.

Parmley v. Norris, 586 F.3d 1066 (8th Cir. 2009). In this non-capital habeas case from Arkansas, the

Eighth Circuit held that the Arkansas Court of Appeals is not a court of last resort under AEDPA's statute of limitation. Therefore, the court held, when a defendant does not seek review from the Arkansas Supreme Court, the one-year limit starts to run from the entry of the judgment of the Arkansas Court of Appeals, and *not* following an additional period of ninety days during which the prisoner could have petitioned for certiorari from the U.S. Supreme Court. Such is the rule in Missouri as well. *See Riddle v. Kemna*, 523 F.3d 850 (8th Cir. 2008) (en banc). Because Parmley's one-year limit was not tolled for the 90-day period for filing cert, his petition was untimely.

MISSOURI SUPREME COURT DECISIONS

Gill v. State, — S.W.3d —, No. SC89831, 2009 WL 4277248 (Mo. Dec. 1, 2009). In this Rule 29.15 appeal, the Missouri Supreme Court held that trial counsel rendered prejudicially ineffective assistance during the penalty phase of Mark Gill's trial. Some weeks before trial, the prosecution disclosed to defense counsel a list of all file names on the murder victim's computer. A number of these file names suggested that the computer contained sexually explicit content, but counsel did not follow up on the issue. Then, at sentencing, the prosecution elicited evidence of the victim's good character, including his many acts of kindness toward his family. In the meantime, Gill's accomplice—Brown—was separately tried for murder, but was sentenced to life. Brown's counsel investigated the computer files, deposed the police officer in charge of the case, and discovered that the victim's computer contained child pornography, bestiality-oriented materials, and evidence of computer "chats" dealing with these same interests. The prosecution at Brown's trial elected not to present the evidence of the victim's character, and Brown was sentenced to life. The Supreme Court held that Gill's counsel were ineffective for not investigating the computer evidence based on the file names that were disclosed to them. The court also found that Gill was prejudiced. Had counsel discovered the information, they could have either persuaded the prosecutor not to present evidence of the victim's character, or they could have rebutted the evidence. Prejudice was particularly apparent from the fact that Gill's accomplice was sentenced to life by a jury that hadn't heard the "good character" evidence.

State v. Taylor, — S.W.3d —, No. SC89294, 2009 WL 3444958 (Mo. Oct. 27, 2009). The Missouri Supreme Court affirmed the conviction and death sentence of Leonard Taylor for killing his girlfriend and her three children in St. Louis County. The court rejected a number of claims that the trial court should have admitted various hearsay statements offered by the defense. The Court also rejected, among other claims, a *Witherspoon* challenge, a claim that the prosecution referred on closing argument to the absence of evidence excluded by the State's motion in limine, and a claim that the trial court should not have admitted an out-of-court statement by Taylor's brother that Taylor admitted to committing the crimes.

State ex rel. Missouri Public Defender Commission v. Pratte, — S.W.3d —, Nos. SC 89882, SC 90195, 2009 WL 4638864 (Mo. Dec. 8, 2009). In this mandamus action, the Missouri Supreme Court struck down two provisions of a regulation issued by the Public Defender Commission, which purported to allow the Public Defender to refuse representation when an office's caseload is excessive. The court expressed considerable sympathy for the problem of overworked public defenders. It observed, among other things, that Missouri's population grew by 9.3 percent during the 1990s, while its prison population grew by 184 percent without any corresponding increase for indigent defense funding. Nevertheless, the court ruled that the public defender cannot exempt itself from cases in which an indigent defendant has, at some point, retained private counsel, so long as the defendant is "indigent" and thus entitled to representation under Mo. Rev. Stat. § 600.086.1. Likewise, a public defender office cannot validly decline to accept any particular category of cases when the office's caseload is too high, because the regulation allowing such a refusal conflicts with the statutes requiring such defendants to be represented by the public defender. The court also held that a trial court cannot appoint a public defender "in his private capacity" to represent a defendant. The opinion nevertheless expresses hope that public defenders, prosecutors, and judges will find other solutions to local caseload crises. Such solutions, the court explained, might include obtaining the prosecutor's agreement to limit cases in which the State seeks a defendant's incarceration, determining types of cases that might be handled by private appointments, refusals by trial courts to appoint counsel so that cases cannot be available for trial or other disposition, or even the public defender office's refusal to accept *all* new cases (as opposed to rejecting categories of cases). The court expressed hesitance to order the legislature to provide more funding for indigent defense, while expressing modest hope that coercive appointments or private

counsel might be permissible and helpful in at least some circumstances.

Belcher v. State, — S.W.3d —, No. SC89589, 2009 WL 2009 4927364 (Mo. Dec. 22, 2009). In this rape case under the DNA testing statute, Mo. Rev. Stat. § 547.035, the Missouri Supreme Court borrowed from case law governing Rules 29.15 and 24.035, and held that a circuit court must provide adequate findings of fact and conclusions of law so that meaningful appellate review can take place. In this case, the circuit court held merely that the record "conclusively" showed that Belcher wasn't entitled to relief. The Missouri Supreme Court therefore reversed and remanded for full findings. The court also held that, on remand, Belcher should be given leave to file a properly verified motion for DNA testing, since the statute is not governed by the strict time limits that apply to other post-conviction remedies.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Johnson v. Mitchell, 585 F.3d 923 (6th Cir. 2009). The Sixth Circuit reversed the district court's denial of relief on a penalty phase IAC claim in this Ohio case. Trial counsel introduced no evidence during the penalty phase, other than Johnson's unsworn statement criticizing the jury's verdict of guilt. Interestingly, trial counsel was the same attorney who, in an earlier proceeding, convinced the Ohio Supreme Court that counsel in Johnson's initial trial was ineffective for doing essentially nothing. At any rate, counsel defended his threadbare defense by stating that he asked his client to name individuals who could "say something good on his behalf," and that Johnson gave him no such names. The Sixth Circuit criticized counsel for, among other things, confining his investigation only to the "'good' things that could be said about the client." The court went on to hold that Johnson was prejudiced by counsel's performance, and the case is noteworthy for the relatively non-remarkable mitigating evidence underlying Johnson's claim. Counsel's dereliction prevented the jury from knowing that Johnson was beaten by his father with an iron cord or coffee pot, that he has child-like thinking patterns and resulting difficulties in establishing interpersonal relationships, that he abused cocaine, and that he had a "mixed personality disorder with histrionic, antisocial, and paranoid features."

Libberton v. Ryan, 583 F.3d 1147 (9th Cir. 2009). In the course of granting penalty phase relief, the Ninth Circuit held that Libberton was sufficiently "diligent" in state court while seeking to develop evidence beyond what he actually presented at that time, and thus, that the federal district court erred by refusing to admit the evidence. Libberton repeatedly asked for a hearing on his IAC claim, but was denied one. The mere fact that he managed to marshal *some* evidence in the form of affidavits did not establish that he was otherwise undiligent, since the test "is not whether the facts could have been discovered but instead whether the prisoner was diligent." *Williams v. Taylor*, 529 U.S. 420, 437 (2000). The Ninth Circuit also remarked that, "The State cannot successfully oppose a petitioner's request for a state court evidentiary hearing, then argue in federal habeas proceedings that the petitioner should be faulted for not succeeding." On the merits, the court noted that counsel called only two witnesses (a friend of the defendant's mother, and the mother of an ex-girlfriend), one of whom had not seen Libberton in ten years; counsel did not interview Libberton's sister; he interviewed Libberton's mother but did not ask her to testify; he did not pursue evidence that a co-defendant was primarily responsible for the murder; and his court-funded investigator did not interview any witnesses. The court held that Libberton was prejudiced, based on counsel's failure to discover and present evidence that another individual was the "instigator" of the murder, and that Libberton was "seriously abused" by his father.

Jones v. Ryan, 583 F.3d 626 (9th Cir. 2009). The Ninth Circuit held that counsel were ineffective in the penalty phase of this California case for two reasons: first, counsel failed to seek a defense mental health expert to evaluate the client, relying instead on a court-chosen expert who provided little assistance, and second, counsel failed to adequately investigate and present mitigating evidence, and conducted no investigation until after the guilt phase verdict. On the first issue, the court held that counsel failed to request a "partisan" expert even though the 1989 ABA Guidelines and *Ake v. Oklahoma* call for one. Counsel also failed to obtain neuropsychological testing, and did not recognize the need to do so until the court-appointed expert recommended it during his testimony. As a result of counsels' failures, it was not discovered that Jones' history includes extensive physical and sexual abuse, numerous head injuries, a suicide attempt, PTSD, ADHD, cognitive dysfunction, and an affective mood disorder, as well as chronic substance addiction stemming from his attempts to self-medicate these problems.

Pinholster v. Ayers, — F.3d —, Nos. 03-99003, 03-99008, 2009 WL 4641748 (9th Cir. Dec. 9, 2009) (en banc). In this capital case from California, a bitterly divided Ninth Circuit affirmed the grant of penalty phase relief. The opinion is noteworthy for the heated exchange between the majority opinion and Chief Judge Alex Kozinsky's dissent, the latter of which all but implores the Supreme Court to spare California and its neighboring states from the Ninth Circuit's supposed excesses. *Compare, e.g.*, 2009 WL 4641748, at *19 ("[O]ur dissenting colleague demonstrates yet again why he would be such a talented writer of fiction. He concocts a fantastical trial strategy for Pinholster's attorneys despite their own admissions that they were simply unprepared."), *with id.* at *32 (criticizing "a habeas regime where few death sentences are safe from federal judges who know ever so much better than those ignorant state judges and lawyers how capital trials ought to be conducted").

United States v. Shipp, — F.3d —, No. 08-5157, 2009 WL 4827367 (10th Cir. Dec. 16, 2009). The Tenth Circuit granted relief in this non-capital section 2255 case, holding that the Supreme Court's opinion in *Chambers v. United States*, 129 S. Ct. 687 (2009), applies retroactively insofar as the case narrowed the scope of the Armed Career Criminal Act. Under *Chambers*, Shipp's prior offense for a prison escape was not a qualifying "violent felony" to enhance his sentence. The court also held that it had the authority to expand the certificate of appealability so that it encompassed a due process challenge to Shipp's excessive sentence.

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

State v. Galindo, 774 N.W.2d 190 (Neb. 2009). The Nebraska Supreme Court affirmed the five murder convictions and death sentence of Jorge Galindo, stemming from a 2002 bank robbery in Norfolk, for which Galindo's accomplices were also sentenced to death. The evidence showed that Galindo personally shot one of the five decedents, and that Galindo was the second most responsible for planning the robbery. An important wrinkle in the case was that the crime occurred three months after the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), but shortly before the Nebraska legislature amended a statute so that a jury must determine the existence of any statutory aggravating factors. Another statute retains the role of a three-judge panel in weighing the aggravators against the mitigators, and in sentencing the defendant to life or death. In Galindo's case, the court held that the statute was only "procedural" in nature, so that it could be applied to the case even though the crime occurred before the statute's enactment. Such a reach of the statute did not violate due process or amount to an "ex post facto" law. The court rejected Galindo's argument that *Ring* effectively invalidated the entirety of Nebraska's capital sentencing scheme, and thus, that Nebraska was essentially without a death penalty law at the time of the offense. The court also rejected Galindo's claim that the statute was a bill of attainder, despite evidence that the legislature enacted the statute in response to the Norfolk killings. Also rejected, among many other claims, were Galindo's arguments that pretrial publicity and jurors' voir dire responses demonstrated that venue should have been moved from Norfolk (a city of roughly 25,000 people); that the trial court had an obligation to "life qualify" jurors under *Morgan v. Illinois*, 504 U.S. 719 (a claim rejected because Nebraska jurors determine only whether aggravating circumstances exist, and not whether the defendant should be sentenced to death); that the jury should have been required to specify, by its verdict, that Galindo was death-eligible under *Enmund/Tison*, particularly after *Ring* (agreeing with the Arizona Supreme Court, the court held that such death eligibility is a question for the court, not jurors, and that *Ring* doesn't apply because *Enmund/Tison* doesn't reflect a statutory criterion). The court sustained Galindo's challenge to the electric chair, while nevertheless affirming the death sentence, and thus, appearing to leave Galindo eligible for execution by lethal injection.

Arkansas Dept. of Corrections v. Williams, — S.W.3d —, No. 08-1031, 2009 Ark. 523, 2009 WL 4545103 (Ark. Oct. 29, 2009). The Arkansas Supreme Court reversed a lower court's ruling that the state's lethal injection protocol was invalid for not having been promulgated through the state's Administrative Procedure Act. While the case was pending, the Arkansas legislature enacted a statute exempting the protocol from the APA. The court therefore held that the Williams' claims were moot, that the statute applied to Williams and other prisoners on death row despite the absence of language specifying that the statute is retroactive, and that there was no *ex post facto* violation.

Newman v. State, 2009 Ark. 539 (2009). Following the federal district court's stay and abeyance of Newman's habeas remedies, the Arkansas Supreme Court granted death row inmate Rickey Dale Newman's petition to reinvest jurisdiction in the circuit court to file a writ of error coram nobis in

order to litigate claims that (i) Newman was incompetent at the time of trial, and (ii) the prosecution withheld exculpatory evidence in violation of *Brady*. On the claim of incompetence, Newman presented evidence that the doctor who found him competent for trial gave him an unreliable IQ test which he scored inaccurately (a claim supported by the earlier examiner's admissions), that he otherwise did not perform a sound evaluation, and that further evaluations conducted during federal habeas review show significant impairments including PTSD, a depressive order, and severely impaired cognitive functioning. On both claims, the court ruled that Newman was sufficiently "diligent" despite not presenting the claims on earlier review. Newman himself dismissed his Rule 37 proceedings, but current counsel presented evidence showing that Newman was incompetent at the time. The court declined to rule on the merits of either claim, assigning this task to the circuit court in the first instance.

Kemp v. State, 2009 WL 4876473, 2009 Ark. 631 (2009). The Arkansas Supreme Court held that a circuit court lacks jurisdiction to entertain a second Rule 37 proceeding, unless two conditions are met: first, counsel must obtain the Arkansas Supreme Court's leave to represent the prisoner in the circuit court, and second, the Arkansas Supreme Court must recall its mandate on the original Rule 37 appeal. In order for the mandate to be recalled, the prisoner must demonstrate "extraordinary circumstances that warrant a reopening of postconviction proceedings." Such circumstances exist when there is (a) some defect in the appellate process, (b) a dismissal of federal habeas proceedings because of unexhausted state court claims, and (c) the "enhanced scrutiny" required in death penalty cases. In Timothy Kemp's case, the Federal Public Defender obtained the Supreme Court's leave to represent Mr. Kemp, but counsel filed a successive Rule 37 petition without a recall of the mandate. The Supreme Court therefore ruled that the circuit court lacked jurisdiction to consider the petition, and that the Supreme Court lacked jurisdiction to entertain the appeal, which it dismissed without prejudice. Presumably Mr. Kemp—whose federal habeas proceedings were stayed and abated so that he could pursue his unexhausted claims in state court—will next move to recall the mandate.

Doss v. State, 19 So.3d 360 (Miss. 2009). The Mississippi Supreme Court vacated the defendant's death sentence based on counsel's ineffective performance. Among other failings, counsel failed to follow up on medical evidence of Doss's head injuries as a child. Counsel also failed to learn that Doss's mother was physically abused when she was pregnant with Doss, that she took Valium at the time, and that Doss suffered lead poisoning as a child. The court rejected the trial court's finding that Doss and his mother were not forthcoming with this information, because counsel did not ask questions that were likely to elicit this evidence, and, in any event, counsel failed to review or follow up on records from a previous conviction showing that Doss started drinking at age 11, did poorly in school, and had a low IQ. Although granting penalty phase relief, a majority of the court affirmed the trial court's ruling that Doss is not mentally retarded under *Atkins v. Virginia*, 536 U.S. 304 (2002).

Bowling v. Kentucky Dept. of Corrections, — S.W.3d —, No. 2007-SC-000021-MR, 2009 WL 4117353 (Ky. Nov. 25, 2009). The Kentucky Supreme Court, by a 4-3 vote, ruled that the Commonwealth's lethal injunction protocol is an "administrative regulation" within the meaning of Kentucky's "Administrative Procedure Act," and accordingly, the protocol must be issued through notice and comment rulemaking. Following the court's decision, the DOC released its 74-page protocol to the public. A revised protocol has been submitted for public comments but won't take effect until at least May 2010.

People v. Nelson, — N.E.2d —, No. 105340, 2009 WL 4843879 (Ill. Dec. 17, 2009). On direct appeal, the Illinois Supreme Court reversed the defendant's death sentence, following the trial court's erroneous striking of a "holdout" juror who wouldn't switch her sentencing vote from life to death. Rather than remanding for a retrial, the court ordered the trial court to impose a sentence of imprisonment, which would have been the result of a split verdict.

Commonwealth v. Bracey, — A.3d —, No. 565 CAP, 2009 WL 5125000 (Pa. Dec. 29, 2009). In the course of remanding the prisoner's *Atkins* claim for an evidentiary hearing in this post-conviction case, the Supreme Court of Pennsylvania held that the prisoner was not entitled under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to a jury determination of whether he is mentally retarded.

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