THE PUBLIC INTEREST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE
January – February 2010

NOTEWORTHY NEWS

LAWMEN BEHAVING BADLY

Three separate opinions from the Missouri Supreme Court—issued within a span of thirteen days—suggest that our prosecutors and their appellate stand-ins are failing to pursue their proper interest "not that [they] shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

In one case, the prosecution failed to disclose evidence of financial and legal favors conveyed to its star snitch witness, and a man has spent 26 years in prison as a result. *State ex rel. Engel v. Dormire*, — S.W.3d —, No. SC90314, 2010 WL 623655 (Mo. Feb. 23, 2010). In a second case, the victim of a statutory rape gave birth after the trial, and a DNA test showed that the defendant was not the baby's father; rather than test the DNA evidence itself or take *any* steps to assess the defendant's innocence, the State devoted its efforts to arguing that the court must forbid an untimely motion for new trial. *State v. Terry*, — S.W.3d —, No. SC90332, 2010 WL 454862, at *2 n.5 (Mo. Feb. 10, 2010) ("The ethical norm that the state attorney's role is to see that justice is done—not necessarily to obtain or to sustain a conviction—may suggest that a different course of action may have been appropriate."). And, in a third case, the prosecution continually referred to and argued the defendant's post-*Miranda* silence, even after the trial judge sustained the defense's objections. *State v. Brooks*, — S.W.3d —, No. SC90347, 2010 WL 623656 (Mo. Feb. 23, 2010) (reversing second degree murder conviction on *Doyle* error).

ANDREW LYONS RESENTENCED TO LIFE UNDER *ATKINS*

Sustaining the findings of a special master, the Missouri Supreme Court resentenced Andrew Lyons to life imprisonment on the basis of mental retardation. *See State ex rel. Lyons v. Lombardi*, — S.W.3d —, No. SC88625, 2010 WL 290391 (Mo. Jan. 26, 2010). The *Lyons* opinion is described in greater detail below.

MISSOURI SUPREME COURT (NARROWLY?) BROADENS PROPORTIONALITY REVIEW

Disapproving sixteen years of misguided and counter-statutory precedent, a bare majority of the Missouri Supreme Court has now held that the court must, when considering whether a death sentence is disproportionate, compare the underlying offense not only to similar cases in which the defendant was sentenced to death, but also to those in which the defendant received a lesser sentence. *See Deck v. State*, — S.W.3d—, No. SC89830, 2010 WL 290450 (Mo. Jan. 26, 2010); *see also* Mo. Rev. Stat. § 565.035. The controlling opinion is the narrow concurrence of Judge Breckenridge, who opined that the court is statutorily obligated to consider non-death cases, but who stated also that a death sentence should be set aside as disproportionate only when it is "aberrant" or otherwise "wanton or freakish." All seven judges agreed that Carman's Deck sentence was not disproportionate. Future cases will, of course, clarify the breadth of the court's review and the scope of relief available.

EIGHTH CIRCUIT UPHOLDS ARKANSAS LETHAL INJECTION PROCEDURES

In *Nooner v. Norris*, — F.3d —, No. 08-2978, 2010 WL 424439 (8th Cir. Feb. 8, 2010), the Eighth Circuit upheld Arkansas' three-chemical protocol as "substantially similar" to the Kentucky protocol approved by the U.S. Supreme Court in *Baze v. Rees*, 553 U.S. 35 (2008). The opinion is described in further detail below. As of this writing, three Arkansas inmates are scheduled for execution in the near future: Jack Harold Jones (March 16), Don W. Davis (April 12), and Stacey Eugene Johnson (May 4).

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The Public Interest Litigation Clinic, 6155 Oak Street, Suite C, Kansas City, MO 64113
(816) 363-2795, Fax: (816) 363-2799
http://www.pilc.net * email – pilc@pilc.net

TO DECIDE NOT TO DECIDE, IS TO DECIDE

In the unfortunate case of *Wood v. Allen*, 130 S. Ct. 841 (2010), the Supreme Court declined to resolve the question on which it had granted certiorari: whether, to overcome a state court's factual finding on habeas review, the prisoner must demonstrate *both* that the factual finding is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under 28 U.S.C. § 2254(d)(2), *and* that the factual finding is disproven by "clear and convincing evidence" under 28 U.S.C. 2254(e)(1). The Supreme Court agreed with the Alabama courts that trial counsel made a "strategic" decision not to present evidence of Wood's mental retardation. That factual finding was not "unreasonable," and so the court ruled that it need not decide whether Wood must also show "clear and convincing evidence" to the contrary.

Even more unfortunate, for Mr. Wood, is that the court refused to consider the legal question of whether counsels' chosen "strategy" was professionally reasonable in light of counsels' limited investigation into Wood's background and limited knowledge of his poor functioning. The Supreme Court ruled that the reasonableness of counsels' "strategy" was not "fairly included" within the question presented in the cert petition. The decision leaves Wood with a colorable claim that counsel failed to discover and present evidence of his mental retardation to the jury that voted to condemn him, but with no tribunal to hear the claim.

Worse still, the Supreme Court relaxed its "fairly included" rule the very next day on behalf of a less disfavored constituency. *See Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010). The court in *Citizens United* overruled two of its own precedents in order to recognize (create?) a First Amendment right of corporations to make independent expenditures in favor of or against candidates for political office and to facially invalidate a federal statute restricting that "right"—even though the complaining corporation made no such request or facial challenge in its cert petition. The inconsistency was not lost on Justice Stevens: "In declaring §203 of BCRA facially unconstitutional on the ground that corporations' electoral expenditures may not be regulated any more stringently than those of individuals, the majority decides this case on a basis relinquished below, not included in the questions presented to us by the litigants, and argued here only in response to the Court's invitation. This procedure is unusual and inadvisable for a court." *Citizens United*, 130 S. Ct. at 931 (Stevens, J., dissenting, and citing, among other authorities, *Wood v. Allen*). [Editor's Note: Thanks to the ACLU's Brian Stull for pointing out this disparity as well].

DENNIS FRITZ AND RONALD WILLIAMSON VINDICATED, AGAIN

The Tenth Circuit upheld the dismissal of a misguided libel suit brought by the prosecutor, police officers, and other Oklahoma officials who were responsible for the wrongful conviction and death sentences of since-exonerated inmates Ronald Williamson and Dennis Fritz. *See Peterson v. Grisham*, — F.3d —, No. 08-7100, 2010 WL 337686 (10th Cir. Feb. 1, 2010). The plaintiffs sued John Grisham for his book describing the case, as well as Mr. Fritz for a separate book detailing his struggles. Neither work amounted to "libel per se," despite the authors' unflattering descriptions of the plaintiffs and their work. Mr. Fritz now lives in the Kansas City area, where he continues to wage his fight against the institution of capital punishment.

KANSAS RETAINS DEATH PENALTY, NARROWLY

On February 19, the Kansas Senate split 20-20 on whether to repeal the state's death penalty. The vote fell one short of the majority needed for passage, and effectively ends this year's repeal effort.

LOUISIANA SUES ENTIRE DEATH ROW

In yet another lesson that capital litigators should never be surprised by anything, Louisiana's Department of Public Safety and Corrections brought suit in February against every member of the state's death row. The suit seeks, among other things, a declaratory judgment that the Department's lethal injection protocol is exempt from Louisiana's Administrative Procedures Act.

OTHER LETHAL INJECTION DEVELOPMENTS

On February 11, Nebraska Governor Dave Heineman gave formal approval to DOC regulations establishing a three-chemical protocol as the state's method of lethal injection. The regulation implements a lethal injection statute enacted by the unicameral, following the Nebraska Supreme Court's 2008 ruling that invalidated death by electrocution. The DOC announced that it could carry out executions as early as this summer, but no such executions are scheduled or anticipated.

In California, a Republican member of the Senate introduced a bill to require that lethal injections be carried out with a single dose of anesthesia, as in Ohio. Orange County Senator Tom Harmon cited medical evidence that a single-drug procedure "removes any risk of the inmate experiencing pain or suffering." Lest we unduly praise the Senator's humanitarian concerns, he also introduced legislation to accelerate the appeals process in capital cases, and he is seeking the Republican nomination for state attorney general.

Meanwhile in Missouri, the leading newspaper in St. Louis featured a front-page story questioning whether officials in various counties are complying with state and federal law when euthanizing dogs. *See* Christine Byers, "Dog's Euthanasia May Have Violated State Law," *St. Louis Post-Dispatch*, Feb. 15, 2010. Among other problems, several facilities carry out the task without a veterinarian present, as state law requires. The absence of a veterinarian makes it illegal for animal shelter workers to administer controlled substances. We at PILC applaud any efforts to make the regrettable process of euthanizing animals humane as well as lawful. But we humbly submit that the State should exercise at least equal care when killing human beings. We therefore lament that the Missouri executes prisoners in a manner that is illegal to use when killing animals, specifically, with the use of a paralytic agent that masks the decedent's ability to experience pain. We also lament that Missouri's execution protocol allows the killing to go forward with the supervision of a nurse or even an emergency medical technician, who is scarcely the medical analogue of a veterinarian. As for controlled substances, the Attorney General insists that the laws governing such drugs do not apply when the State kills mere people. That question is currently being litigated. *See Ringo et al. v. Lombardi et al.*, W.D. Mo. Case No. 2:09-cv-04095-NKL.

MACDL RECOGNIZES PILC ATTORNEY JENNIFER MERRIGAN

The Missouri Association of Criminal Defense Lawyers has bestowed its 2010 Atticus Finch Award upon PILC's Jennifer A. Merrigan. MACDL gives the award "to those who serve unflinchingly, while defending unpopular clients or taking up unpopular causes." The award reflects Ms. Merrigan's heroic efforts to seek clemency and judicial relief for her client, Dennis J. Skillicorn, who was executed by the State of Missouri on May 20, 2009. Ms. Merrigan is the second PILC attorney to be so recognized in as many years; Joseph W. Luby received the Atticus Finch Award in 2009.

U.S. SUPREME COURT RECENT DECISIONS

Wellons v. Hall, 130 S. Ct. 727 (2010). In this bizarre capital habeas case from Georgia, the prisoner alleged a host of misconduct claims involving the trial judge, the bailiff, and the jurors. These individuals had something of a "reunion" shortly after trial, at which time the jurors gave a chocolate penis to the judge and a pair of chocolate breasts to the bailiff. The state and federal courts denied Wellons a hearing on his claims. The Eleventh Circuit held that the claims were procedurally defaulted as "successive," because the state court ruled on post-conviction review that it had already considered the claims on direct appeal. There was no question, then, that the Eleventh Circuit's ruling conflicted with *Cone v. Bell*, 129 S. Ct. 1769 (2009). The Eleventh Circuit's opinion, however, was ambiguous as to wether the court was also upholding the district court's denial of an evidentiary hearing, and if so, whether that ruling was independent of the Eleventh Circuit's *Cone* error. The Supreme Court therefore summarily vacated the Eleventh Circuit's judgment and remanded for further proceedings: "The Eleventh Circuit's opinion is ambiguous in significant respects. It would be highly inappropriate to assume away that ambiguity in respondent's favor." The majority strongly suggested that Wellons is entitled to an evidentiary hearing, and that AEDPA's review provisions should not inform whether to grant a hearing when the state courts have denied one: "It would be bizarre if a federal court had to defer to state-court factual findings, made without any evidentiary record, in order to decide whether it could create an evidentiary record to decide whether the factual findings were erroneous. If that were the case, then almost no habeas petitioner could ever get a hearing: So long as the state court found a particular fact that the petitioner was trying to disprove through the presentation of evidence, then there could be no hearing. AEDPA does not require such a crabbed and illogical approach to habeas procedures, and there is no reason to believe that the Eleventh Circuit thought otherwise."

Wood v. Allen,130 S. Ct. 841 (2010). In this capital habeas case from Alabama, the Supreme Court declined to resolve the question on which it had granted certiorari, that is, whether a habeas petitioner who demonstrates that a state court's factual finding is "unreasonable" under 28 U.S.C. § 2254(d)(2) must

also show that the state court's factual finding is disproven by "clear and convincing evidence" under 28 U.S.C. § 2254(e)(1). The prisoner in this case challenged (among other things), an Alabama post-conviction ruling that trial counsel made a "strategic" decision not to present evidence that Wood may be mentally retarded. Based on its review of the record, the Supreme Court held counsel necessarily made such a "strategic" decision not to present the evidence. Therefore, the state court did not "unreasonably" find counsel's decision to be "strategic" in nature. Because the state court's finding was not unreasonable under section 2254(d)(2), the Supreme Court ruled that it need not reach the question of whether § 2254(e)(1) also applies. The Supreme Court also declined to reach the question of whether counsel's "strategic" decision was professionally reasonable under *Strickland* and *Wiggins*. Wood argued that counsel did not reasonably decide against presenting certain evidence, because he had not adequately investigated Wood's mental health and background. Counsel knew of an expert's report on Wood's limited functioning, but were unaware of factual background evidence such as observations that Wood was reading at a third grade level and was classified as "educable mentally retarded" by the local school system. Although the reasonableness of counsels' "strategy" and the adequacy of their investigation was discussed at length in Wood's petition for writ of certiorari, the court ruled that it was not "fairly included" within the question presented.

Thaler v. Haynes, — S. Ct. —, No. 09-273, 2010 WL 596511 (U.S. Feb. 22, 2010). The Supreme Court summarily reversed a rare grant of habeas relief from the Fifth Circuit in this *Batson* case. The Fifth Circuit granted relief because two different trial judges presided over different phases of jury selection. The judge who overruled the defendant's *Batson* objection and who sustained the credibility of the prosecutor's explanation about the juror's demeanor, hadn't actually witnessed that portion of the proceedings. The Supreme Court ruled that habeas relief could not be based on 28 U.S.C. § 2254(d)(1), because none of its precedents requires the trial judge to have personally witnessed a venireperson's demeanor in order to rule on the permissibility of a demeanor-based strike. Neither *Batson* nor *Snyder v. Louisiana*, 552 U.S. 472 (2008), creates such a requirement, the court reasoned. Furthermore, to the dubious extent that *Snyder* may have added any such requirement, it was not "clearly established law" when Haynes' case was pending in state court. The Supreme Court therefore ruled that the Fifth Circuit erred in granting relief by reasoning that the state court's ruling was an unreasonable application of, or contrary to, clearly established federal law. The court nevertheless observed that Haynes might still be eligible for relief under the "federal habeas statute's standard for reviewing a state court's resolution of questions of fact." The opinion did not specify whether it was referring to 28 U.S.C. § 2254(d)(2) (unreasonable determination of facts based on the state court record), or 28 U.S.C. § 2254(e)(1) (clear and convincing evidence to overcome state court factual finding), or to both. Thus, *Thaler* does not appear to answer the question that the court declined to resolve in *Wood v. Allen* (see above).

Smith v. Spisak, 130 S. Ct. 676 (2010). The court reversed the Sixth Circuit's grant of habeas relief on two separate claims. First, the court held that the jury instructions were not likely to have led the jurors to believe that mitigating circumstances must be found unanimously to exist in order for jurors to give them any weight, distinguishing *Mills v. Maryland*, 486 U.S. 367 (1988). Second, the court held that Spisak—who committed three murders, only to boast about them from the witness stand in furtherance of his pro-Nazi objectives—was not prejudiced by trial counsel's rambling, incoherent, and troublingly pro-prosecution closing argument during the penalty phase. The court reserved the question of whether 28 U.S.C. § 2254(d) applies despite the state court's summary finding of no *Strickland* prejudice. [Editor's note: The court granted certiorari on February 22 to address that question, in *Harrington v. Richter*, below].

McDaniel v. Brown, 130 S. Ct. 665 (2010). The Supreme Court unanimously reversed the Ninth Circuit's grant of habeas relief in this rape case from Nevada. In granting relief under *Jackson v. Virginia*, 443 U.S. 307 (1979), the Ninth Circuit relied on an expert's DNA report, issued eleven years after trial. The report concluded that the prosecution and its witnesses overstated the strength of the State's DNA evidence, and understated the possibility that the semen in question could have been from one of the defendant's brothers. The Supreme Court held that the new report does not render the trial evidence insufficient for a conviction, and, therefore, that the Nevada Supreme Court did not unreasonably apply *Jackson* in upholding the conviction. Brown alternatively asserted a due process claim that the new report made his conviction unreliable. The Supreme Court rejected the latter claim as untimely, since it was presented for the first time to the Supreme Court itself.

Presley v. Georgia, 130 S. Ct. 721 (2010). In this summary reversal of a Georgia drug conviction, the Supreme Court held that the Sixth Amendment right to a public trial extends to voir dire. The court observed that although the trial judge in Presley's case expressed a generalized concern that improper communications might occur between prospective jurors and the defendant's brother—the only member of the public who wished to attend—the trial judge failed to consider any other protective measures short of excluding the public altogether.

Florida v. Powell, — S. Ct. —, No. 08-1175, 2010 WL 605603 (U.S. Feb. 23, 2010). Continuing its decades-long Swiss-cheesing of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that it was sufficient for a suspect to be informed that he has "the right to talk to a lawyer before answering any of [the police officers'] questions" and that he can invoke his right to an attorney "at any time . . . during the interview." The court rejected the Florida Supreme Court's reasoning that the warnings were ambiguous by suggesting (a) that Powell could ask for counsel only before the interview started and not after that point, or (b) that Powell could seek an attorney's help only by leaving the interview room after a particular question, rather than having an attorney present throughout the meeting. By a vote of 7-2, the Supreme Court held that the warnings given to Powell "reasonably conveyed" *Miranda*'s requirement that a suspect "be warned prior to any questioning . . .that he has the right to the presence of an attorney."

Maryland v. Shatzer, — S. Ct. —, No. 08-680, 2010 WL 624042 (U.S. Feb. 24, 2010). Not content with the previous day's watering down of *Miranda* in the *Powell* case, the Supreme Court on February 24 limited the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), to a two-week period following the suspect's invocation of *Miranda* rights. Otherwise stated, when (i) a suspect invokes the right to be silent or to have counsel present, (ii) police stop the interrogation, (iii) police make another attempt at least fourteen days later, and (iv) the suspect waives his *Miranda* rights and confesses, then (v) the suspect's statement will not be presumed involuntary under *Edwards*. In *Shatzer*, the defendant was already in prison on another offense, and police sought to question him on allegations that he sexually abused his son. He invoked his right to have counsel present, and so the police terminated the interview and returned Shatzer to the general prison population. Over two years later, another police officer resumed the investigation and interviewed Shatzer once again, and this time, Shatzer waived his *Miranda* rights, made inculpatory statements, and was convicted of sexual child abuse. The court ruled that Shatzer's confession was admissible—far exceeding the fourteen-day rule created by the court, which "provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."

CERT GRANTED

Harrington v. Richter, — S. Ct. —, No. 09-587, 2010 WL 596530 (U.S. Feb. 22, 2010). In addition to the question presented, the court granted certiorari to consider the following question: "Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland v. Washington*, 466 U.S. 668 (1984)?" The question originally presented is as follows: "Does a defense lawyer violate the Sixth Amendment right to the effective assistance of counsel when he does not investigate or present available forensic evidence supporting the theory of defense he uses during trial and instead relies on cross-examination and other methods designed to create reasonable doubt about the defendant's guilt?"

EIGHTH CIRCUIT DECISIONS

Nooner v. Norris, — F.3d —, No. 08-2978, 2010 WL 424439 (8th Cir. Feb. 8, 2010). The Eighth Circuit upheld an adverse grant of summary judgment in this case challenging Arkansas' lethal injection procedures. A unique aspect of the case is the Arkansas Department of Correction's statutory authority to change its lethal injection protocol at any time. The court deemed, as an "amendment" to the protocol, an affidavit by Ray Hobbs (a DOC official who has since become the department's interim director). The proffered "amendment" effectively displaced the bulk of the prisoners' objections to the protocol. That fact, coupled with the district court's refusal to allow full discovery before granting summary judgment, made it all but impossible for the prisoners to prevail. On the merits, the Eighth Circuit dispatched each of the plaintiffs' eight attacks on the protocol, including the risk that a prisoner might remain conscious after administration of sodium pentothal; the possibility that the DOC might resort to a central line placement, a cut-down procedure, or an injection of the lethal chemicals directly into the

prisoner's heart; and the qualifications of the IV team. The court more generally determined that Arkansas' protocol is "substantially similar" to the Kentucky protocol upheld in *Baze v. Rees*, 553 U.S. 35 (2008), as well as the Missouri protocol upheld in *Taylor v. Crawford*, 487 F.3d 1072 (8th Cir. 2007).

King v. United States, — F.3d —, No. 09-2212, 2010 WL 609986 (8th Cir. Feb. 23, 2010). The court granted relief under § 2255 in this crack cocaine case because the defendant was erroneously sentenced as a career offender, and appellate counsel was ineffective for not raising this illegality as a basis for resisting the defendant's waiver of his appeal. In the course of granting relief, the court acknowledged that appellate counsel's ineffectiveness was not included within the certificate of appealability. The court nevertheless explained, "[W]e retain discretion to consider *sua sponte* issues beyond those specified in a certificate of appealability . . . We think it appropriate to expand the certificate in this case, particularly because King filed his § 2255 motion pro se and the issues were therefore not presented to the district court as clearly as they might have been."

Armstrong v. Kemna, 590 F.3d 592 (8th Cir. 2010). Reversing the district court's grant of habeas relief from the prisoner's non-capital conviction of first degree murder, the Eighth Circuit held that Armstrong was not sufficiently "prejudiced" to overcome the default of his IAC claim. On the question of what "prejudice" means, the court cited previous Eighth Circuit case law stating that the "prejudice" to overcome a procedural default is greater than the "prejudice" required for an IAC claim under *Strickland*. The court also acknowledged other Eighth Circuit authority suggesting that the two standards "may be similar." [Editor's Note: Apparently not interested in SCOTUS precedent on the point, the Eighth Circuit did not cite *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (equating *Brady* prejudice to the prejudice required under the "cause and prejudice" test), or *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (same). Equally shocking is that the Missouri Attorney General's office did not cite *Banks* or *Strickler* in its briefs, despite urging the Eighth Circuit to apply a heightened "prejudice" standard.]

Polson v. Bowersox, — F.3d —, No. 08-3919, 2010 WL 610041 (8th Cir. Feb. 23, 2010). The Eighth Circuit held that a prisoner's petition for habeas corpus relief under Missouri Supreme Court Rule 91 constitutes a "properly filed application for State post-conviction or other collateral relief" so as to toll the federal statute of limitation under 28 U.S.C. § 2244(d). The same is true for a motion to reopen post-conviction proceedings and motions to recall the mandate, at least in Missouri. *See Streu v. Dormire*, 557 F.3d 960, 965 (8th Cir. 2009); *Bishop v. Dormire*, 526 F.3d 382, 384 (8th Cir. 2008); *Marx v. Gammon*, 234 F.3d 356, 357 (8th Cir. 2000).

MISSOURI SUPREME COURT DECISIONS

State ex rel. Lyons v. Lombardi, — S.W.3d —, No. SC88625, 2010 WL 290391 (Mo. Jan. 26, 2010). The Missouri Supreme Court reduced Andrew Lyons' death sentence to life imprisonment in this habeas corpus action. The court accepted the findings of a special master, who concluded that Lyons' IQ fell between 61 and 70, that he had deficits in adaptive behavior as to communication and functional academics, and that these conditions were manifest before the age of 18 even though Lyons' IQ was never tested during his childhood. The State vigorously contested the last point, arguing that Mr. Lyon's failure to obtain an IQ test before age 18 entitled the State to kill him. The court was not persuaded: "The records that Lyons presented and the testimony received are sufficient for the master to conclude that Lyons' conditions were not a recent fabrication and that they were documented prior to Lyons attaining 18 years of age."

Deck v. State, — S.W.3d—, No. SC89830, 2010 WL 290450 (Mo. Jan. 26, 2010). In this direct appeal, the Missouri Supreme Court upheld the death sentence imposed on Carman Deck, following the U.S. Supreme Court's reversal of a previous death sentence. *See Deck v. Missouri*, 544 U.S. 622 (2005). The court unanimously rejected a number of claims, including the trial court's striking of certain death-scrupled jurors, inadequate notice of the non-statutory aggravating circumstances used by the State, and numerous instances of improper prosecutorial argument. Much more significant is the court's refinement of its process for reviewing the proportionality of a death sentence. Judge Stith, joined by Judges Teitelman and Wolff, opined that Mo. Rev. Stat. § 565.035 requires the court to consider all "similar cases," including those in which a non-capital sentence was imposed. Such non-capital cases must be considered, Judge Stith opined, in order "to determine whether the sentence of death is disproportionate in light of the crime, the defendant and the strength of the evidence." The concurrence compared Deck's case to a number of non-capital cases cited by Deck, and opined that Deck's death sentence was not disproportionate. Concurring by

herself, Judge Breckenridge agreed that proportionality review must account for non-death cases. She nevertheless would apply a less searching review than Judge Stith, and she opined that a death sentence should be set aside as disproportionate only when it is "aberrant" or otherwise "wanton or freakish." The other three judges (Fischer, Price and Russell) believed that the court should abide by its longstanding precedent limiting review to other capital cases, noting that the legislature has not sought to correct the court's limited proportionality review. The controlling opinion on the issue, then, appears to be Judge Breckenridge's.

State ex. rel. Engel v. Dormire, — S.W.3d —, No. SC90314, 2010 WL 623655 (Mo. Feb. 23, 2010). Based on a *Brady* claim featuring newly discovered evidence, the Missouri Supreme Court granted habeas corpus relief to Gary Engel on his convictions of kidnapping and armed criminal action. The trial prosecution alleged that Engel and others were hired by drug dealer Anthony Mammolito to kidnap a competing drug dealer. Not disclosed to the defense was evidence that Mammolito was paid for his testimony, that police were helping him secure a release from federal prison, that he gave contradictory accounts of the "crime" when speaking with law enforcement, and that investigators "coached" him so that his testimony would align with their versions of the alleged crime. Mammolito was not charged in the crime at all, but Engel and alleged co-perpetrator Steven Manning were tried five years after it allegedly took place, shortly after authorities interviewed Mammolito while he was in prison. Much of the *Brady* evidence was unearthed by Manning, who previously secured federal habeas relief of his parallel conviction, and who sued the offending police officers in an Illinois federal court.

A number of noteworthy procedural rulings accompanied the Missouri Supreme Court's grant of relief to Mr. Engel, who has served 26 years on his wrongful conviction. First, in finding that Engel established the requisite "cause" and "prejudice" to overcome his failure to present the same *Brady* claim in earlier appellate or post-conviction proceedings, the court ruled that it sufficed for Engel to satisfy the "prejudice" or "materiality" test for a *Brady* claim—in other words, that there is a "reasonable probability" that the jury would reached a different verdict if the exculpatory evidence had been disclosed. Second, the court rejected the State's argument that Engel had already presented a *Brady* claim in earlier Rule 29.15 proceedings, and thus, that he lacked "cause." The court observed that the current claims were distinct from the previous ones "because they rest on a collection of new evidence developed in Manning's cases and unknown or unavailable when Engel previously sought relief." Third, the court rejected the State's argument that there was no "suppression" under *Brady* because certain letters and other documents memorializing a "deal" did not exist at the time of trial, and thus, could not have been disclosed. The court reasoned that "it is enough that the evidence shows that the 'deal' itself already existed, even if it had not yet been documented." Fourth, the court ruled that it was irrelevant that the investigators were not from Missouri or working in Missouri at the time: "These investigators were part of Missouri's prosecutorial team in the kidnapping cases against Engel and Manning, essentially acting as the prosecutor's agents during the investigation." Fifth and finally, the court ruled that the withheld evidence was material under *Brady* even though Mammolito was otherwise impeached at trial with evidence of his criminal history and the fact that he testified in return for not being charged in the kidnapping.

State v. Terry, — S.W.3d —, No. SC90332, 2010 WL 454862 (Mo. Feb. 10, 2010). In this direct appeal from a statutory rape conviction, the Missouri Supreme Court remanded for consideration of an otherwise untimely motion for new trial based on DNA evidence. The victim was pregnant at the time of trial and testified that the defendant was her only sexual partner. Months later, after the witness gave birth—and well after the 25 days for filing a motion for new trial—a DNA test showed that the defendant was not the child's father. The evidence, then, did not surface until the case was on appeal. The court made a number of important observations in the course of its ruling. First, it held that an appellate court has "the inherent power to prevent a miscarriage of justice or manifest injustice by remanding a case to the trial court for consideration of newly discovered evidence presented for the first time on appeal." Second, the court ruled that Terry appeared to satisfy the standard for obtaining a new trial, and that the DNA evidence, if proven, would not merely "impeach" the victim's testimony, even though it would not fully exonerate the defendant by itself. Third, the court strongly suggested that a finding of perjury alone would justify a new trial, even when the motion is untimely. Fourth, the court backhandedly criticized the State for making no investigation into whether the new DNA report is accurate: "The ethical norm that the state attorney's role is to see that justice is done—not necessarily to obtain or sustain a conviction—may suggest that a different course of action may have been appropriate."

State v. Brooks, — S.W.3d —, No. SC90347, 2010 WL 623656 (Mo. Feb. 23, 2010). A unanimous court reversed the defendant's convictions for second degree murder and armed criminal action in this self-defense case involving a *Doyle* error. Throughout the trial proceedings, the State emphasized that Brooks remained silent after his *Miranda* warning, in clear violation of *Doyle v. Ohio*, 426 U.S. 610 (1976). The State continued with its misconduct even after the trial court upheld relevant objections during the opening statement as well as when the prosecution offered the testimony of the interviewing police lieutenant. One interesting wrinkle is that a number of *Doyle* errors were not objected to, including when an audiotape of Brooks' dealings with the police was played for the jury, and also when the prosecution emphasized Brooks' silence on closing argument. The court nevertheless considered these additional violations in determining whether the defendant was prejudiced. The court also stated that it "always has the discretion to engage in plain error review of issues concerning substantial rights, especially constitutional rights such as the one at issue here." Reversal was required because the violations were not harmless beyond a reasonable doubt; the trial court did little to cure the errors, the evidence of self-defense was not "transparently frivolous," and the strength of the prosecution's evidence was "substantial but not overwhelming."

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Winston v. Kelly, 592 F.3d 595 (4th Cir. 2010). In this procedurally rich capital habeas case from Virginia, the Fourth Circuit remanded for further proceedings on the prisoner's claim that trial counsel was ineffective for not discovering and presenting an *Atkins* claim. The wrinkle in this case is that, although Winston had a number of IQ tests that scored in the 70s, it was not until federal habeas proceedings that counsel discovered an earlier IQ score of 66. The Fourth Circuit held, first, that the addition of one more IQ test on habeas review did not "fundamentally alter" the prisoner's claim so as to render it non-exhausted. Second, the court ruled that the prisoner was sufficiently diligent in developing his evidence in state court, for purposes of 28 U.S.C. § 2254(e)(2). Winston asked for discovery and a hearing, but was denied both. And, he could not obtain the earlier IQ score by subpoena as he did on federal habeas review, because Virginia law affords no subpoena power when a post-conviction hearing is denied. Therefore, the Fourth Circuit held that it was permissible for the district court to conduct a hearing. Third, and most interestingly, the court held that 28 U.S.C. § 2254(d) will not apply to the prisoner's claim on remand. The new claim features significant evidence that the state court declined to consider on the cold record that the state court insisted upon having. Therefore, it does not make sense for a federal court to assess whether the state court "reasonably" decided the narrower claim before it.

Ward v. Hall, 592 F.3d 1144 (11th Cir. 2010). The Eleventh Circuit granted habeas relief in this Georgia capital case, on a claim the bailiff gave an ex parte instruction to jurors during penalty phase deliberations. Several jurors asked the bailiff whether they could sentence the defendant to life without parole. Georgia law, at the time, required trial courts to answer any such questions by stating that jurors cannot consider the issue of parole. The bailiff, instead, told the jurors that life without parole "is not an option." Juror affidavits later proved that one or more jurors sentenced Ward to death out of concern that he might eventually get paroled. The Eleventh Circuit held that Ward's Sixth Amendment rights were violated under *Remmer v. United States*, 347 U.S. 227 (1954), and other authorities. The court also ruled that the error was not harmless. Additionally, the court held that Ward had "cause" to overcome his procedural default for failing to raise the claim on direct appeal. The bailiff and trial judge failed to inform the defense about the jurors' questions, and thus, there was a "state-created impediment" to the claim's timely assertion.

Reed v. Quarterman, 555 F.3d 364 (5th Cir. 2010). In the course of granting habeas relief on a *Batson* claim in this capital case from Dallas County, Texas, the Fifth Circuit declined to impose a procedural default based on the Texas Court of Criminal Appeals' refusal to conduct a "comparative juror analysis." The state court reasoned that such an analysis was not presented to the trial court, but the Fifth Circuit reasoned that such a rule is not usually applied by the CCA in *Batson* cases, and that Reed's case was an "outlier" in this regard. The Fifth Circuit also relied on *Miller-El v. Dretke*, 545 U.S. 231 (2005), which considered a comparative juror analysis under similar circumstances, and over the dissent of Justice Thomas and others. In finding that the State struck two black venirepersons because of race, the court observed not only that a finding of "pretext" may arise when the prosecution's stated explanation also applies to a white juror who wasn't stricken, but also that such an inference of "pretext" does not require the white comparator juror to

embody every single characteristic of the stricken black juror – in other words, the two jurors need not be "similarly situated" in every respect.

Harrison v. Gillespie, 590 F.3d 823 (9th Cir. 2010). In this § 2241 case, the Ninth Circuit invoked double jeopardy principles to bar a penalty phase retrial after a Nevada jury deadlocked on punishment at the defendant's first trial. In Nevada, a capital jury must make two factual findings beyond a reasonable doubt in order to consider the defendant for a death sentence: first, the jury must find that at least one statutory aggravating circumstance exists, and second, the jury must find that no mitigating circumstances outweigh the aggravators. Even if these two facts are found, the jury may still choose to impose a non-death sentence. In Harrison's case, defense counsel asked for the deadlocked jury to be polled, so that the court could determine the point at which the jurors were split. The prosecution objected to the request, which the trial court denied. On habeas review, the Ninth Circuit reasoned that the jury might have declined to find that the mitigators outweighed the aggravators. Moreover, in light of the trial court's refusal to poll the jurors, there was no "manifest necessity" to justify a retrial. The court therefore ordered that Gillespie be given a non-capital sentence, without the possibility of a capital retrial. Of additional significance, the Ninth Circuit ruled that AEDPA's review provisions do not apply to § 2241 proceedings, so that the federal constitutional issues were determined *de novo*.

Peterson v. Grisham, — F.3d —, No. 08-7100, 2010 WL 337686 (10th Cir. Feb. 1, 2010). The Tenth Circuit affirmed the district court's dismissal of this civil libel action brought by the Oklahoma officials who were responsible for the wrongful convictions and death sentences of Ronald Williamson and Dennis Fritz. The plaintiffs, including a prosecutor, sued John Grisham for his book about the case (*An Innocent Man*), as well as Mr. Fritz for his book detailing his struggles (*Journey Toward Justice*). For good measure, the plaintiffs also sued famed innocence attorney Barry Scheck for a chapter he wrote about the case. The Tenth Circuit held that the plaintiffs could not establish the stringent proof needed under Oklahoma law in order for public officials to show "libel per se."

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

Miller v. State, — S.W.3d —, 2010 Ark. 1, No. CR08-1297, 2010 WL 129708 (Ark. Jan. 7, 2010). In this triple homicide case, the Arkansas Supreme Court reversed James Miller's death sentence because two of the victims' relatives testified that Miller should be sentenced to death. Such testimony violates the Eighth Amendment under *Payne v. Tennessee*, 501 U.S. 808 (1991), and the error was not harmless beyond a reasonable doubt.

The court nevertheless upheld the trial court's ruling, by a preponderance of the evidence, that Miller is not mentally retarded—and thus, the trial court's decision to submit that issue to the jury under Arkansas law. First, the court rejected the argument that *Atkins v. Virginia* requires a broader review than that prescribed by Arkansas' statute, which creates a "rebuttable presumption" of mental retardation if the defendant's IQ is 65 or below, in contrast to a legal and professional consensus outside of Arkansas recognizing a presumption of mental retardation for those with IQs of 70-75. The court also noted that the state statute is not solely concerned with IQ scores, and that a judge or jurors must also consider deficits in adaptive functioning. Second, the court observed that all experts agreed that Miller's IQ is above 65, including one examiner who stated that a score of 59 resulted from malingering. The court described "conflicting" evidence concerning adaptive behavior—including evidence that Miller has been able to write letters and "hold telephone conversations" when incarcerated. The bad news, for Miller, is that the Arkansas Supreme Court appears to need further education about the typical abilities of persons with mild mental retardation. The good news is that Miller's jury will be able consider the MR issue anew on resentencing.

Sanders v. State, Nos. CR90-58, CR91-4 (Circuit Courts of Hot Springs and Grant Counties). In an unpublished order dated February 23, 2010, a specially-appointed judge granted coram nobis relief to Arkansas death row inmate Raymond C. Sanders. Relief was granted on a *Brady* claim based on the prosecutor's withholding of evidence that a snitch witness was given immunity on a rape charge in exchange for testifying that he heard Sanders confess to killing the two victims. [The trial prosecutor has since been convicted and imprisoned on federal corruption charges]. The State has announced its intention to retry Sanders. Before that occurs,

Sanders' counsel intends to raise with the Arkansas Supreme Court a separate claim on which the specially-appointed judge denied relief, relating to the venue for trial as well as retrial, and evidence that the prosecution and judge improperly moved the 1991 trial to a nearly all-white venue.

State v. Vela, 777 N.W.2d 266 (Neb. 2010). In yet another affirmance of a death sentence resulting from the five-homicide bank robbery in Norfolk, the Nebraska Supreme Court upheld the convictions and death sentence of Erick Fernando Vela. Consistent with its rulings as to Vela's accomplices, the court held that a Nebraska statute requiring the jury to determine the existence of aggravating circumstances is not an impermissible *ex post facto* law as to Vela's crime, which took place shortly before the U.S. Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002). Likewise, the court held that Vela's death sentence remains intact despite the state supreme court's intervening decision finding electrocution to be cruel and unusual punishment under the state constitution. The court also upheld the trial court's determination that Vela is not mentally retarded. In doing so, the court applied a key aspect of the prevailing clinical definition of mental retardation—that the individual suffers from "significant limitations" in adaptive behavior—rather than giving literal effect to Nebraska's statute, which, in relevant part, requires only "deficits" in adaptive behavior. *See* Neb. Rev. Stat. § 28-105.01(3). Justice Connolly dissented on the MR issue, opining that the court was not free to adopt a more stringent definition of mental retardation than the legislature intended.

Ferrell v. State, — So.3d—, Nos. SC07-1447, SC07-92, 2010 WL 114481 (Fla. Jan. 14, 2010). The Florida Supreme Court upheld the trial court's grant of penalty phase relief in this capital post-conviction appeal. On the prisoner's *Wiggins* claim, the court held that the defendant's trial waiver of mitigating evidence was not knowing and voluntary. Numerous relatives and friends of Ferrell testified that they tried to contact trial counsel, who ignored them. Indeed, trial counsel conducted essentially no mitigation investigation whatsoever. The court went on to hold that Ferrell was prejudiced by the absence of the evidence, which included a showing that Ferrell grew up in a crime-ridden and drug-infested neighborhood, and that Ferrell might suffer from a frontal lobe disorder. It was significant for the court that the jury voted only 7-5 in favor of death, and also that counsel perpetuated his ineffectiveness by failing to object to numerous improper arguments in the prosecutor's closing.

Johnson v. State, — So.3d —, No. SC08-1213, 2010 WL 121248 (Fla. Jan. 14, 2010). The Florida Supreme Court granted penalty phase relief on a *Giglio* claim in this procedurally unusual triple-homicide case. At trial, the State presented a snitch witness who testified to Johnson's cold-blooded descriptions of the killings as well as Johnson's alleged plans to "play like he was crazy." The trial court admitted the snitch's testimony, based in part on the prosecution's representation that the snitch was acting completely on his own and without any direction from the State. Shortly after trial, the snitch's seven-year prison sentence was vacated. Over two decades later, Johnson's attorneys obtained the prosecutor's trial notes. The notes revealed that, in fact, the prosecution told the snitch to gather and report statements from Johnson, in obvious violation of Johnson's Sixth Amendment right to counsel. *See United States v. Henry*, 447 U.S. 264 (1980). To make matters worse, the prosecution stood silently by during the snitch's perjured testimony at the suppression hearing and trial, to the effect that the snitch was acting alone. The resulting *Giglio* violation was not material to Johnson's conviction, but the court ruled that the error cast doubt on the reliability of Johnson's death sentence. [Editor's Note: PILC's Terri Backhus served as co-counsel for Mr. Johnson in the Florida Supreme Court].

Johnson v. Levy, No. M2009-02596-COA-R3-CV, 2010 WL 119288 (Tenn. Ct. App. Jan. 14, 2010) (unpublished). The Tennessee Court of Appeals ruled that, under the state's "Preservation of Religious Freedom" statute, a medical examiner cannot perform a post-execution autopsy in light of religious objections by the decedent and his widow.

CLINICAL STAFF

Joseph W. Luby	***Staff Attorney***
Jennifer A. Merrigan	***Staff Attorney***
Terri L. Backhus	***Of Counsel***
Sean D. O'Brien	***Of Counsel***
Codi Campbell	***Paralegal***

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6155 OAK STREET, SUITE C
KANSAS CITY, MO 64113