THE PUBLIC INTERST LITIGATION CLINIC
**MISSOURI CAPITAL CASE UPDATE**

***February - April 2009***

# *NOTEWORTHY NEWS*

## EXECUTION DATE SET AGAINST DENNIS SKILLICORN

On April 20, 2009, the Missouri Supreme Court scheduled the execution of Dennis J. Skillicorn for May 20. Skillicorn would be the first Missouri prisoner to be executed since Marlin Gray on October 26, 2005. A number of challenges to the scheduled execution are pending as of this writing. Skillicorn and other prisoners are also challenging the constitutionality of Governor Jay Nixon's role as clemency decision-maker, in light of the governor's previous role in seeking the prisoners' execution when he served as attorney general, and most especially, in obstructing the prisoners' access to the evidence they developed in support of their clemency efforts. *See Skillicorn, Middleton and Bucklew v. Nixon*, No. 09-4071-CV-C-SOW/WAK (W.D. Mo.). The Missouri Supreme Court vacated an earlier execution date against Skillicorn on account of that very obstruction.

## MISSOURI LETHAL INJECTION UPDATE

The Missouri Supreme Court ruled, by a 4-3 vote, that the Department of Corrections' lethal injection protocol is not subject to the state's Administrative Procedure Act. *Middleton v. Missouri Dept. of Corrections*, 278 S.W.3d 193 (Mo. banc 2009). A more detailed description of the court's disappointing opinion appears below. The immediate upshot is that shortly after issuing a modified opinion and denying rehearing, the court scheduled an execution date against Dennis Skillicorn.

Still pending in the Eighth Circuit is *Clemons et al. v. Crawford et al.*, No. 08-2895, which was argued February 11. *Clemons* is an Eighth Amendment challenge to Missouri's lethal injection procedures, based primarily on the state's historically inadequate vetting of execution personnel – including the now famous "Dr. John Doe Number One," whose dyslexia led him to vary the dosages of the lethal chemicals from execution to execution. Although Dr. Doe is absent from Missouri's current execution team, that anonymous group now includes a nurse with a conviction for aggravated stalking. An opinion in *Clemons* could issue at any time.

## HABEAS RELIEF GRANTED TO MICHAEL WORTHINGTON

On March 27, 2009, U.S. District Judge Charles A. Shaw granted sentencing phase relief to Missouri inmate Michael Worthington. The court held that trial counsel did not adequately investigate Worthington's social, medical and family history, and thus, failed to provide critical information to mental health experts who would have diagnosed Worthington with untreated bipolar disorder, Tourette's syndrome, and brain dysfunction attributable to head injuries from child abuse, among other problems. Judge Shaw therefore ruled that counsel's failures prejudiced Worthington during the sentencing phase.

## SUPREME COURT CLARIFIES THAT FEDERALLY APPOINTED HABEAS COUNSEL MAY PURSUE STATE CLEMENCY PROCEEDINGS

In Harbison v. Bell, 129 S. Ct. 1481 (2009), the Supreme Court clarified that 18 U.S.C. § 3599 allows federally-appointed habeas counsel to represent a death-sentenced inmate in state clemency proceedings. Such has long since been the law here, under the Eighth Circuit's opinion in Hill v. Lockhart, 992 F.2d 801 (8th Cir. 1993). But the Supreme Court reversed the Sixth Circuit's opinion to the contrary. Harbison's implications are important and helpful. First and most immediately, the Eighth Circuit expressed doubts on the viability of Hill during the pendency of Harbison, cutting two recent clemency-related fee vouchers by 67.6% and 56.7%. Harbison removes any doctrinal basis for this treatment. Second, the majority in Harbison held, in footnote 7, that habeas counsel may seek appointment and funding on a case-by-case basis when the need arises to exhaust a claim in state court during the pendency of federal habeas proceedings – a principle that may well extend to state judicial proceedings commenced after habeas proceedings have run their course. The statute in question requires counsel to represent the prisoner in respect to competency as well as clemency, and throughout "all available post-conviction process," among other things. 18 U.S.C. § 3599(e). Third, the Harbison majority reiterated the importance of habeas proceedings in ensuring that the death penalty is constitutionally applied. The court relied on its earlier holding in Herrera v. Collins, 506 U.S.

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390 (1993), that "clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." It described clemency as "the failsafe of our justice system." Fourth, the opinion casts doubt upon the Eighth Circuit's requirements for compensation, as specified in Hill – and in particular, the requirement that counsel seek authorization for his or her efforts before pursuing them. Harbison suggests that the authorization took place in 1988, when Congress passed the predecessor of section 3599. But the better practice may be for counsel to seek a clemency-specific appointment or other pre-authorization in any event.

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## US SUPREME COURT RECENT DECISIONS

Harbison v. Bell, 129 S.Ct. 1481 (2009). Resolving a split among the courts of appeals, the Supreme Court held 7-2 that federally appointed counsel may be assigned to and compensated for the task of representing a death-sentenced prisoner in state clemency proceedings. The court held that 18 U.S.C. § 3599(a)(2) triggers the appointment of counsel for condemned habeas petitioners, and that section 3599(e) governs the scope of counsel's duties. Subsection (e), in turn, requires counsel to represent the prisoner throughout "all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and . . . also . . . in such competency proceedings and proceedings for executive or other clemency as may be available." The court also opined, in footnote 7, that counsel may seek compensation on a case-by-case basis when exhausting a claim in state court during the pendency of federal habeas proceedings. It is arguable that counsel's ability to litigate "all available post-conviction process" includes state judicial proceedings after federal habeas proceedings have run their course. Chief Justice Roberts's concurrence rejects such a reading of the statute, while Justice Thomas's concurrence says the question is unresolved (while suggesting that such a reading is consistent with the majority's interpretation of the statute, which he accepts).

Cone v. Bell, — S. Ct. —, No. 07-1114, 2009 WL 1118709 (Apr. 28, 2009). In its third review of this long-running and procedurally muddled capital case from Tennessee, the Supreme Court considered the prisoner's Brady claim. The claim asserts that the prosecution withheld evidence documenting Cone's intoxication at the time of the crime. The Supreme Court held that the claim was not procedurally barred. The claim was first presented in a post-conviction action after Cone's direct appeal and initial PCR proceeding, and the state courts erroneously held that the claim had already been raised and rejected. The Supreme Court held that this ruling did not give rise to a procedural default, and indeed, it suggested that Cone had adequately presented the claim. Therefore, a state court ruling that a claim is "successive" will not usually bar federal review. The court also ruled that the claim was not defaulted by Cone's apparent failure to raise the claim earlier, since the state courts did not rely on this failure in refusing to consider the claim: "Although we have an independent duty to scrutinize the application of state rules that bar our review of federal claims . . . we have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so." Addressing the claim's merits, the court held that the suppressed evidence was not material to Cone's conviction, because the evidence of his drug abuse did not show that he was incapable of forming the criminal intent for first degree murder. As to the penalty phase, the court ruled that the additional evidence of his drug use might be material. The extent of Cone's intoxication was a contested issue at trial. The suppressed evidence "may well have been material to the jury's assessment of the proper punishment." The court therefore remanded the case to the district court, presumably for an evidentiary hearing.

Knowles v. Mirzayance, 129 S. Ct. 1411 (2009). In what has become a recurrent theme, the Supreme Court reversed the Ninth Circuit's grant of habeas relief. Mirzayance pleaded not guilty as well as not guilty by reason of insanity (NGI) in this non-capital murder case. Under California law, the jury heard separate trials of the guilt phase and the NGI phase. At the guilt phase, the defense asserted that Mirzayance was mentally ill, and thus, unable to form the required intent for first degree murder. This defense failed. Prior to the NGI phase, counsel advised Mirzayance to withdraw his NGI plea, which would be based on essentially the same evidence that the same jury had rejected in the guilt phase; in addition, counsel had earlier hoped to call his client's parents during the penalty phase, but they either refused to testify or were hesitant to do so. Mirzayance waived the NGI plea on counsel's advice. In reversing the Ninth Circuit's grant of relief, the Supreme Court rejected the notion that counsel can be ineffective for advising the client to forgo a proceeding in which the defense merely has "nothing to lose." The court held that none of its precedents require such diligence by trial counsel, and therefore, that the state courts did not unreasonably reject the claim. The court went on to reject Mirzayance's claims *de novo*, holding that counsel did not act unreasonably and that "prevailing professional norms"

do not require counsel to pursue a defense that is almost certain to lose. The court also held that Mirzayance could not show prejudice under Strickland.

Rivera v. Illinois, 129 S. Ct. 1446 (2009). In this non-capital murder case from Illinois, the trial court sustained the prosecution's objection to one of defense counsel's peremptory challenges, arguing that the defense struck a prospective juror because of her gender under Batson v. Kentucky, 476 U.S. 79 (1986), and later decisions. A unanimous Supreme Court held that even if the trial court erred by disallowing the strike, Rivera would not be entitled to a retrial under the Sixth Amendment or the Due Process Clause without a specific showing of prejudice. The juror in question was not challengeable for cause, and Rivera did not show that any seated juror was biased. The court held not only that the trial court's alleged error would not require "automatic reversal," but went on to reason that there was no constitutional error at all: "The loss of a peremptory challenge due to a state court's good-faith error is not a matter of federal constitutional concern."

Kansas v. Ventris, — S. Ct. —, No. 07-1356, 2009 WL 1138842 (Apr. 29, 2009). In this case an informant was placed in the defendant's cell after murder charges were filed but before trial, and the defendant admitted to the robbery and murder at issue. The state conceded that this act violated Ventris's Sixth Amendment rights, but it nevertheless presented the snitch's testimony at trial in order to impeach Ventris's testimony denying the crime. By a vote of 7-2, the Supreme Court held that the admission a statement obtained in violation of the Sixth Amendment may nevertheless be admitted for impeachment purposes.

Puckett v. United States, 129 S. Ct. 1423 (2009). In this narcotics case, the government agreed, in exchange for Puckett's guilty plea, to recommend a downward departure from the Guideline range on account of Puckett's substantial assistance to prosecutors. Puckett went on to commit other criminal acts, and at sentencing, the government opposed a departure. Puckett did not seek to withdraw his plea at that time. The Supreme Court ruled that Puckett's claim of a breach in the plea agreement was reviewable only for "plain error" under Fed. R. Crim. P. 52(b). It went on to find no plain error under the facts of the case.

### CERT GRANTED

Smith v. Spisak, 129 S. Ct. 1319 (2009) (Case No. 08-724). Following the Sixth Circuit's grant of penalty phase relief in Spisak v. Hudson, 512 F.3d 852 (6th Cir. 2008), the Supreme Court granted certiorari to consider the following questions.

1. Did the Sixth Circuit contravene the directives of the [AEDPA] and Carey v. Musladin, 127 S. Ct. 649 (2006), when it applied Mills v. Maryland, 486 U.S. 367 (1988), to resolve in a habeas petitioner's favor questions that were not decided or addressed in Mills?

2. Did the Sixth Circuit exceed its authority under AEDPA when it applied United States v. Cronic, 466 U.S. 648 (1984), to presume that a habeas petitioner suffered prejudice from several allegedly deficient statements made by his trial counsel during closing argument instead of deferring to the Ohio Supreme Court's reasonable rejection of the claim under Strickland v. Washington, 466 U.S. 668 (1984)?

### CERT DENIED

Thompson v. McNeil, 129 S. Ct. 1299 (2009). The court denied certiorari as to the prisoner's "Lackey" claim, which asserted that his 32 year stint on death row constituted cruel and unusual punishment. Justice Stevens issued a separate statement as to the cert denial, Justice Breyer dissented from the denial, and Justice Thomas concurred in order to register his strong disagreement with his two colleagues. The three opinions make for lively and entertaining reading, and more importantly, they foreshadow what may become a more fertile area of law as more prisoners stay on death row for longer periods of time.

## MISSOURI STATE COURT DECISIONS

Middleton v. Missouri Dept. of Corrections, 278 S.W.3d 193 (Mo. banc 2009). By a 4-3 vote, the Missouri Supreme Court ruled that the DOC's lethal injection protocol was not subject to the Missouri Administrative Procedure Act, and therefore, that the DOC did not violate the Act by failing to propose the protocol in the Missouri Register, entertain public comments through a hearing or otherwise, notify a joint committee of the legislature, and other measures. The court reasoned that the protocol fell within an exemption to the APA for agency statements "concerning *only* inmates of an institution under the control of the department of corrections." The court so held despite the fact that most of the protocol's commands are directed to outside medical practitioners who, among other things, mix the lethal chemicals, place the IV line, monitor the prisoner's condition, and pronounce death. The majority reasoned that the protocol does not "concern" these non-inmates, because the role of the practitioners who execute prisoners is "incidental" to executions. The court also reasoned that the method-of-execution statute suggests a legislative intent to exempt the protocol from rulemaking. The statute is silent on the need for APA

promulgation but expressly requires the "how to" portion of the protocol to be maintained as an open record. Judge Wolff's dissent took issue with this last point, arguing that it is not inconsistent for an agency's proclamation to be publicly available and publicly promulgated. Judge Teitelman also dissented, reasoning that the phrase "concerning only inmates" means "relating exclusively to inmates," and that the medical professionals have more than an "incidental" involvement: "The very purpose of the execution protocol is to direct medical professionals administering lethal chemicals with the purpose of ending the life of another human being." Chief Judge Stith joined both dissents.

State v. Baumruk, — S.W.3d —, No. SC88497, 2009 WL 837694 (Mo. banc Mar. 31, 2009). Following a retrial after a change of venue was ordered on a previous direct appeal, the Missouri Supreme Court affirmed the conviction and death sentence of Kenneth Baumruk for killing his wife and shooting at eight other people during a divorce hearing at the St. Louis County Courthouse in 1992. The court upheld the trial court's refusal to allow Baumruk to represent himself, despite also affirming the trial court's ruling that Baumruk was competent to stand trial. The court rejected Baumruk's other claims, including a claim that the trial should have been moved to some venue other than St. Charles County, which borders St. Louis County.

Zink v. State, 278 S.W.3d 170 (Mo. banc 2009). The Missouri Supreme Court affirmed the denial of Rule 29.15 relief to death-sentenced prisoner David Zink. Among the claims rejected by the court were that trial counsel performed ineffectively by not obtaining a PET scan and expert testimony in order to relate Zink's brain imaging to his psychological disorders. The court acknowledged that such testimony would have been admissible during the penalty phase, but it held that Zink was not prejudiced in light of "overwhelming" aggravating evidence, as well as trial evidence describing Zink's disorders and those within his family history. The court also rejected claims that counsel should have objected to the sheriff's insistence that the defendant wear a non-visible leg restraint during trial, and that counsel should have objected to numerous portion's of the state's closing argument.

Gehrke v. State, — S.W.3d —, No. SC 89527, 2009 WL 837723 (Mo. banc Mar. 31, 2009). In this non-homicide case, the Missouri Supreme Court held, by a 4-3 vote, that the "abandonment" rule does not apply when post-conviction counsel is instructed to perfect an appeal from the denial of relief under Rule 29.15 or 24.035, but fails to do so. The court limited the "abandonment" remedy to cases in which counsel fails to prepare an amended motion for post-conviction relief.

State ex rel. Missouri Public Defender Commission v. Hamilton, — S.W.3d —, Nos. WD 70327, WD 70349, 2009 WL 987468 (Mo. App. W.D. Apr. 14, 2009). The Missouri Court of Appeals held that the public defender system cannot decline to accept new cases on account of the system's acknowledged shortage of resources and its attorneys' unmanageable caseloads. The case involved certain probation revocation matters that the public defender refused to accept. The refusal was based upon a regulation promulgated by the Public Defender Commission, which stated that public defender districts whose caseloads exceed certain levels could refuse appointments for certain categories of cases. The Court of Appeals held the regulation invalid. Relying on State ex rel. Pub. Defender Comm'n v. Bonacker, 706 S.W.2d 449 (Mo. banc 1986), the court held that the Commission cannot by rule decline representation to persons who are statutorily entitled to court-appointed counsel. The court was sympathetic with the public defender system's unreasonable caseloads and limited budgets, but said the solution lies primarily with the legislature. [As things now stand, and with appropriate thanks to our legislature, Missouri ranks 49th out of the 50 states in per capita spending on indigent defense services, despite having the 18th-highest incarceration rate among the states].

## EIGHTH CIRCUIT DECISIONS

Earl v. Fabian, 556 F.3d 717 (8th Cir. 2009). In this non-capital case from Minnesota, the Eighth Circuit vacated the district court's holding that Earl's habeas petition was untimely. When counsel wrote to Earl that his conviction had been affirmed, and later that the Minnesota Supreme Court had denied rehearing, these communications did not reach Earl for several months. The circumstances are disputed and somewhat unclear, but prison authorities refused to tell counsel where Earl was being incarcerated, and then held on to the letters for months before delivering them to Earl. The Eighth Circuit held that Earl was not entitled to equitable tolling, since under even the most favorable reading of the record, he had several months available to file for habeas relief after discovering that his conviction became final, but he failed to do so. Nevertheless, the court observed that Earl's petition might be timely under 28 U.S.C. § 2244(d)(1)(B). That statute allows a prisoner one year to file a petition, starting from "the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed." The court declined to read a "diligence" requirement into the statute, and it remanded the case to the district court for a determination of whether the state's interference with Earl's right of access to the courts prevented Earl from filing his petition.

Streu v. Dormire, 557 F.3d 960 (8th Cir. 2009). In another opinion involving the AEDPA statute of limitation, the Eighth Circuit remanded this non-capital Missouri case for further proceedings. In the course of its ruling, the court held that Streu was entitled to statutory tolling during the pendency of his motion to re-open his

post-conviction proceedings, which unsuccessfully argued that Rule 29.15 counsel had abandoned him. The court followed its earlier opinion in Bishop v. Dormire, 526 F.3d 382 (8th Cir. 2008), which held that a motion to recall the mandate constitutes an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2). Even with the statutory tolling, however, Streu's habeas petition was filed 83 days too late. The petition was untimely because Streu's murder conviction became final during the later of either (a) when the time limit expired to seek transfer in the Missouri Supreme Court, or (b) when the court of appeals issued its mandate after affirming Streu's conviction. See Riddle v. Kemna, 523 F.3d 850, 853-56 (8th Cir. 2008) (en banc), overruling Nichols v. Bowersox, 172 F.3d 1068, 1072 (8th Cir. 1999) (en banc) (holding that conviction was not final until passage of ninety days within which to petition the U.S. Supreme Court for certiorari). Because Nichols was the law of the circuit when Streu's conviction became final, the Eighth Circuit remanded for a determination of whether equitable tolling should be applied.

## DISTRICT COURT DECISIONS

Worthington v. Roper, No. 4:05-CV-1102 CAS, 2009 WL 878704 (E.D. Mo. Mar. 27, 2009). Judge Charles A. Shaw granted sentencing phase habeas relief to Missouri inmate Michael Worthington, on a claim that trial counsel rendered ineffective assistance by failing to investigate, discover and present evidence describing Worthington's social and medical history. Counsel's threadbare investigation included brief phone calls with the client's mother and aunt, as well as a few records provided by predecessor counsel. Post-conviction counsel, by contrast, presented extensive evidence of the family's turbulent history and extensive mental illness – including severe child abuse suffered by the defendant, as well as the fact that some of Worthington's juvenile convictions were for crimes committed by his parents. PCR counsel also obtained hundreds of pages of Illinois prison records, which trial counsel had not sought. Judge Shaw held that Worthington was prejudiced as to sentencing, because counsel failed to provide mental health experts with relevant evidence of the defendant's background. Such evidence would have helped the experts diagnose Worthington with untreated bipolar disorder, Tourette's syndrome, brain dysfunction attributable to head injuries, and susceptibility to substance abuse.

## SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

### FIFTH CIRCUIT

Haynes v. Quarterman, 561 F.3d 535 (5th Cir. 2009) The Fifth Circuit reversed the district court's denial of relief on the prisoner's Batson claim in this Texas capital case. The prosecutor stated that he struck certain black veniremembers because of their demeanor. The trial court denied the defendant's Batson challenge, but the judge himself was absent from voir dire when the relevant jurors were being questioned, and a substitute judge sat in his place. Because the trial court could not competently assess the genuineness of the "demeanor" explanation from the record alone, the Fifth Circuit held that the state courts unreasonably applied Batson by upholding the absent judge's ruling.

Thurmond v. Quarterman, No. 08-70008, 2009 WL 585618 (5th Cir. Mar. 9, 2009) (unpublished). In this capital case, the Fifth Circuit denied a certificate of appealability on the issue of whether Thurmond was entitled to equitable tolling. Habeas counsel attempted to deliver the petition on the day it was due, but the court's after-hours drop box was not working that evening. Counsel instead mailed the petition, and it reached the court one day late. This case should serve as a reminder that counsel should never delay filings until the eleventh hour. A recent article in the *Houston Chronicle* revealed nine capital cases from Texas in which counsel failed to comply with federal filing deadlines. Six of these prisoners have been executed.

### SIXTH CIRCUIT

Van Hook v. Anderson, 560 F.3d 523 (6th Cir. 2009). In this pre-AEDPA capital case from Ohio, the Sixth Circuit held that trial counsel performed ineffectively by not adequately investigating the defendant's background. Counsel began his cursory investigation only days before the sentencing hearing. Although counsel learned that Van Hook's parents were alcoholics and had a dysfunctional relationship, counsel did not learn that Van Hook was repeatedly beaten by his parents, that he watched his father try to kill his mother several times, or that his mother was committed to a psychiatric hospital. Counsel declined to interview numerous relatives and other witnesses who would have shared these facts and appeared at trial. The court went on to hold that Van Hook was prejudiced by counsel's errors.

### TENTH CIRCUIT

Douglas v. Workman, 560 F.3d 1156 (10th Cir. 2009). In this capital case, the Tenth Circuit affirmed the grant of habeas relief on a Brady/Giglio claim as to one Oklahoma inmate (Powell), and reversed the

denial of relief on the same claim as to a second inmate (Douglas). At both prisoners' trials, the witness identifying Douglas and Powell as the killers testified he had not made a "deal" with the prosecution. He later recanted, testified that he could not actually identify either prisoner, and said he had testified at the trials because the prosecutor assured him of favorable treatment on drug trafficking charges. Most interesting is the court's grant of relief as to Douglas, whose habeas petition had already been denied when the witness issued an affidavit recanting his trial testimony. The Tenth Circuit held that the resulting Brady and Giglio claims were properly before it for review and would not be treated as successive under AEDPA. The court cited a number of considerations supporting this holding: Douglas's petition was on appeal when the evidence came to light and the resulting claims were asserted; the claim was closely related to an already asserted claim of prosecutorial misconduct; the prosecutor's violation of Brady and Giglio was willful, intentional, and actively concealed; the case involved the death penalty; it would be inequitable and arbitrary to grant relief to one prisoner and deny relief to a second prisoner on the identical claim; and the grant of relief would not be inconsistent with the statutory aims of AEDPA.

Taylor v. Workman, 554 F.3d 879 (10th Cir. 2009). In this Oklahoma capital case, the Tenth Circuit held that the trial court's refusal to instruct the jury on second-degree murder violated Taylor's constitutional rights under Beck v. Alabama, 447 U.S. 625 (1980). The court ruled that a rational jury could have acquitted Taylor of first degree murder, and could have convicted him of second degree murder, by accepting the defendant's account that he shot in the victim's direction while he was withdrawing from the conflict and in a panic. Despite the fact that the victim was shot twice in the back, the court observed that *Beck* requires a lesser-included instruction when the evidence would support such a verdict, and not simply when a reviewing court believes the lesser offense to be the most consistent with the evidence. The Oklahoma Court of Criminal Appeals erred by assuming that *Beck* does not apply when the evidence "suggests" a finding of first degree murder, and its ruling was contrary to clearly established federal law.

## ELEVENTH CIRCUIT

McGahee v. Alabama Dept. of Corrections, 560 F.3d 1252 (11th Cir. 2009). The Eleventh Circuit reversed the district court's denial of habeas relief in this capital case from Alabama, and it granted relief on the prisoner's Batson claim. At trial, the judge denied the defense's Batson objection after the state struck all remaining blacks from the venire. The prosecutors offered only generalized explanations for the strikes, such as that the stricken jurors "would be detrimental to the interests of the state." Before allowing the prosecutors to review their notes in search of more specific explanations, the trial court overruled the defense's objections. The Eleventh Circuit held that the court's ruling was contrary to Batson , which requires the prosecution to articulate specific reasons for its strikes so that the court may determine whether the reasons are genuine. The court went on to hold that the Alabama Court of Appeals unreasonably applied Batson in the course of reviewing the claim, by not considering all of the relevant evidence. Among other things, the state appellate court ignored the fact that the defendant was left with an all-white jury; that one of the state's explanations was nebulous and historically linked to racial discrimination ("low intelligence"), and that the stated explanation lacked specific evidentiary support in the record.

Gary v. Hall, 558 F.3d 1229 (11th Cir. 2009). The Eleventh Circuit affirmed the denial of habeas relief in this capital case, holding that the state courts did not violate Ake v. Oklahoma, 470 U.S. 68 (1985), by denying funding for an independent serology expert. The Eleventh Circuit reasoned that the Supreme Court had not, at the time Gary's conviction became final, extended Ake beyond the realm of mental health experts. Therefore, the court reasoned that the trial court was not constitutionally obligated to provide an independent serology expert.

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