THE DEATH PENALTY LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE
September 2010 – February 2011

NOTEWORTHY NEWS

THE YEAR IN REVIEW

The year 2010 was refreshingly quiet. Not a single execution was carried out within the Eighth Circuit's death penalty states of Missouri, Arkansas, Nebraska, and South Dakota. These same jurisdictions saw only two new death sentences, with one each in Arkansas and Nebraska (and not counting Missouri's re-sentencing of Michael Tisius in Boone County). These numbers mirror national trends. According to the Death Penalty Information Center's year-end report, the number of new death sentences nationwide was about the same as 2009 (114 compared to 112), which was itself the lowest number in 34 years. Last year witnessed 46 executions nationwide, compared to 52 in 2009, and 98 in 1999.

MISSOURI EXECUTION UPDATES

On February 9, 2011, the state of Missouri executed Martin Link, who was convicted of murder and rape in St. Louis. Mr. Link's execution is Missouri's first since that of Dennis Skillicorn on May 20, 2009. Mr. Link sought to stay the execution on numerous bases, including the lethal injection litigation in *Ringo v. Lombardi* (see "Missouri Lethal Injection Developments," below), a renewed challenge to trial counsel's effectiveness during the penalty phase, and a challenge to Missouri's clemency procedures.

The Missouri Supreme Court scheduled two additional executions that were not carried out. Richard Clay was scheduled for execution on January 12, 2011, but his sentence was commuted to life without parole by Governor Jay Nixon. Clay sought clemency based on a persuasive claim of innocence. Governor Nixon issued a statement that the evidence "clearly supports" the jury's verdict, but that he was exercising his authority to commute the sentence after "having looked at this matter in its entirety and after significant thought and counsel." DPLC assisted counsel for Mr. Clay in developing a video in support of clemency for the Governor and parole board. The video is available on youtube and can be accessed through our website at www.dplclinic.com.

Roderick Nunley was scheduled to be executed October 20, 2010. Nunley obtained a stay based on his claim that he was entitled to a jury determination of his sentence, under *Ring v. Arizona*, 536 U.S. 584 (2002), notwithstanding his guilty plea to the underlying charges. The Missouri Supreme Court summarily denied relief "on the merits" despite that court's earlier holding that *Ring* applies retroactively in the state. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003). Nunley therefore filed a supplemental federal habeas petition, and U.S. District Judge Fernando J. Gaitan granted a stay, reasoning that it was unclear whether the state court was arbitrarily withholding the benefit of *Whitfield* or simply ruling that *Ring* does not apply to defendants who plead guilty. *Nunley v. Bowersox*, No. 99-8001-CV-W-FJG, 2010 WL 4272474 (W.D. Mo. Oct. 18, 2010). The Eighth Circuit and U.S. Supreme Court denied the State's motions to vacate the stay of execution. The Missouri Supreme Court thereafter declined the State's request to clarify its ruling on the eve of the scheduled execution, and it scheduled Mr. Nunley's claims for further briefing and oral argument.

NATIONAL LETHAL INJECTION DEVELOPMENTS

On January 21, 2011, Hospira, Inc., announced that it was ceasing the manufacture of sodium thiopental. The vast majority of death penalty states carry out executions with sequential injections of sodium thiopental (an anesthetic that makes the prisoner unconscious), pancuronium bromide (to paralyze the prisoner and stop breathing), and potassium chloride (which stops the heart). The purpose of thiopental is to prevent the prisoner from suffering otherwise excruciating pain from the other two drugs. *See Baze v. Rees*, 553 U.S. 35, 53 (2008). Hospira is the only domestic manufacturer of the drug, and it ceased production because an Italian firm that supplied a required ingredient did not have adequate assurances that the drug wouldn't be used for executions.

IN THIS ISSUE

Hospira's announcement left Missouri and dozens of other death-penalty states scrambling for alternate supplies of the drug, or for alternate means of execution. Thus far, one state – Ohio – has switched to a one-drug protocol in which the prisoner is injected with a fatal dose of the barbiturate pentobarbital. Another state – Oklahoma – has retained a three-drug protocol by substituting pentobarbital for sodium thiopental, despite the fact that pentobarbital has no medical track record as an anesthetic. Still other states have obtained thiopental from foreign sources who are not approved by the FDA to manufacture and distribute the drug, and whose product has not been verified as safe, effective, and of equivalent concentration to the domestic drug. These states include Arizona, California, Arkansas, Tennessee, Georgia, and Nebraska.

News accounts revealed that the FDA has assisted at least Arizona and California in efforts to obtain foreign thiopental. The agency issued a statement in January, stating that the agency does not regulate lethal injections, and that it is exercising its enforcement discretion so as not to verify the "safety, effectiveness, purity, or any other characteristics" of imported lethal injection drugs. In response, various inmates from California, Arizona, and Tennessee, have sued the FDA under the Administrative Procedure Act, challenging its stated policy of non-enforcement despite facial violations of the Food, Drug, and Cosmetic Act. *See Beaty et al. v. FDA et al.*, D.D.C. Case No. 1:2011cv00289. Counsel are from the Washington law firm of Sidley & Austin, as well as the Arizona Federal Public Defender.

MISSOURI LETHAL INJECTION DEVELOPMENTS

Still pending in the U.S. District Court for the Western District of Missouri is the lethal injection case of *Ringo et al. v. Lombardi et al.*, No. 09-4095-CV-C-NKL. Prisoner-plaintiffs claim that Missouri's execution protocol conflicts with, and is preempted by, the federal Food, Drug, and Cosmetic Act and the Controlled Substances Act. The district court has repeatedly refused to dismiss the case, but, nevertheless, it has also declined to stay the then-scheduled executions of Dennis Skillicorn, Roderick Nunley, Richard Clay, and Martin Link. Briefing on cross-motions for summary judgment was completed in February.

Meanwhile, Missouri's known supply of thiopental expired March 1. It is not known what means the Department of Corrections will employ to carry out any additional executions, whether by using its small quantity of expired thiopental, by obtaining foreign thiopental, or by switching to pentobarbital or some other drug. On January 25, 2011, Missouri Attorney General Chris Koster signed a letter along with twelve other state AGs, urging U.S. Attorney General Eric Holder to assist the states in finding alternative supplies of thiopental. According to the Associated Press, AG Holder sent a letter to the National Association of Attorneys General on March 4, advising them that "the federal government does not have any reserves of sodium thiopental for lethal injections and is therefore facing the same dilemma as the states."

ARKANSAS LETHAL INJECTION DEVELOPMENTS

Legal challenges continue in Arkansas, most notably in the Pulaski County Circuit Court case of *Jones v. Hobbs*, No. CV-2010-1118. The Arkansas Supreme Court has stayed three execution dates due to the pendency of *Jones*. The circuit court denied the State's motion to dismiss as to the prisoners' claim that the bizarre "Method of Execution Act" violates Arkansas's constitutional separation of powers. A supplemental complaint alleges violations of the Eighth Amendment (among other things), based on the state's importation of thiopental from Dream Pharma, of London, which the complaint described as "ramshackle, one-man operation run from the back of a driving school, Elgone Driving Academy." The state, for its part, has sold some of its supply to Oklahoma and Tennessee for executions in those states. Meanwhile, the British human rights organization Reprieve has brought suit in London, seeking recall of all thiopental distributed by Dream Pharma, based on evidence that prisoners recently executed with the imported thiopental were not fully anesthetized.

NEBRASKA LETHAL INJECTION DEVELOPMENTS

Nebraska, which has not carried out an execution since it electrocuted Robert Williams in 1997, has obtained 500 grams of thiopental from a company in India. The amount is far in excess of what would be needed to execute the state's twelve death-row inmates, but the state reportedly bought the minimum amount that it could from the Indian supplier. The state denies any intention of selling or transferring its supply to other states. Shortly after the shipment reached the state, the attorney general's office asked the Nebraska Supreme Court to schedule the execution of Carey Dean Moore. That request remains pending.

DISPROPORTIONATE PROPORTIONALITY

As reported in our last two newsletters, the Missouri Supreme Court has decided to apply the actual language of the proportionality review statute, and to compare the capital case at hand with similar cases in which the sentencer declined to impose the death penalty. *See State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. 2010); *State v. Davis*, 318 S.W.3d 618, 643-45 (Mo. 2010); *State v. Anderson*, 306 S.W.3d 529, 544 (Mo. 2010). Unfortunately, it now appears that defendants who were wrongly denied full proportionality review before 2010 may be without a remedy, even though the court admits that its earlier practice was contrary to statute. In an unpublished order on Richard Clay's motion to recall the mandate, (Case No. SC78373, Dec. 9, 2010), the court stated the Clay "received proportionality review in the manner provided by

law at the time of that review," and that proportionality review as provided in *Dorsey* "is not to be applied retrospectively." The same issue is before the court, following fuller briefing and argument, in the case of Roderick Nunley (Case No. SC76981, on motion to recall mandate, argued Jan. 5, 2011). The Eighth Circuit refused to stay Clay's scheduled execution or to grant a certificate of appealability, ruling that a state court "is not constitutionally compelled to make retroactive its new construction of a state statute." *Clay v. Bowersox*, 628 F.3d 996 (8th Cir. 2011).

JUDGE WOLFF TO RETIRE

In October, Missouri Supreme Court Judge Michael Wolff announced that he would retire from the court in order to assume full-time teaching responsibilities at the St. Louis University School of Law, beginning in the Fall semester of 2011. Judge Wolff was appointed to the court by Governor Mel Carnahan in 1998, after serving as the governor's counsel and teaching at SLU for over two decades. Governor Jay Nixon will appoint Judge Wolff's replacement.

ARKANSAS CLAIMS PROSECUTORIAL INFALLIBILITY

In the noteworthy "West Memphis Three" case, the Arkansas Supreme Court ordered further DNA testing and other proceedings for death-sentenced prisoner Damien Echols, as well as his two life-sentenced codefendants. *See Echols v. State*, — S.W.3d —, No. CR 08-1493, 2010 WL 4353535 (Ark. Nov. 4, 2010). A trial court in Arkansas may deny further DNA testing if initial tests are "inconclusive." At issue was the meaning of "inconclusive." The state argued that a test is necessarily "inconclusive" unless it fully resolves the defendant's claim of innocence ("legally inconclusive"), as opposed to not conclusively matching or excluding a particular person ("scientifically inconclusive"). Unable to specify any cases or circumstances in which DNA testing alone would definitively establish the killer's identity, the state argued that the statute is unlikely to *ever* result in any prisoner being freed. According to the state, the statute reflects "confidence that the Arkansas criminal-justice system does not convict the innocent." The Arkansas Supreme Court was not persuaded: "We decline the invitation to interpret the statutes in this way because it would render them meaningless."

FEDERAL PROSECUTORS AVOIDING BLACK JURORS IN DEATH PENALTY CASES

A recent study shows that federal prosecutors are successfully removing death penalty cases from state urban jurisdictions with large populations of African-Americans, so that the cases are instead tried in geographically larger and less diverse federal districts. *See* G. Ben Cohen & Robert Smith, "The Racial Geography of the Federal Death Penalty," 85 *Washington L. Rev.* 524 (2010). The transfer of such cases away from urban state jurisdictions dramatically whitens the jury pool. It also prevents the community in which the crime occurred from fashioning a sentence that reflects the community's injury and sense of outrage. One of the jurisdictions studied by the authors was St. Louis – a city in which 49 percent of residents are black and 47 percent are white. St. Louis juries have returned only one death since the year 2000. The federal Eastern District of Missouri is much different. The Eastern or "St. Louis Division" of the district draws jurors from fifteen counties in addition to St. Louis City, and its population is 78 percent white and 18 percent black. The U.S. Attorney General has authorized a total of six capital prosecutions in the Eastern District of Missouri, and all six defendants are black. Three defendants from the Eastern District are on the federal death row. All of them are black, all victims were white, and all the crimes took place in the city of St. Louis.

ILLINOIS ABOLISHES DEATH PENALTY

On March 9, 2011, Illinois Governor Pat Quinn signed into law a bill repealing the state's death penalty. On the same date, Governor Quinn commuted the sentences of all fifteen of Illinois' death row prisoners to life without parole. Illinois joins New Jersey and New Mexico as recent states to have legislatively abolished the death penalty. Governor Quinn observed that twenty inmates had been exonerated from the state's death row since 1977. "Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it," he explained. "I have found no credible evidence that the death penalty has a deterrent effect on the crime of murder and that the enormous sums expended by the state in maintaining a death penalty system would be better spent on preventing crime and assisting victims' families in overcoming their pain and grief."

TEXAS EXONERATIONS

The state of Texas freed Anthony Graves last October, some sixteen years after he was wrongly convicted and sent to death row, and four years after the Fifth Circuit ordered his retrial. Prosecutors elected not to retry Mr. Graves, finally concluding that he had no role in the slaying of a grandmother, her daughter, and four grandchildren in Somerville, Texas. Another condemned Texas prisoner was not so lucky. Charles Jones was put to death on December 7, 2000. Jones asked then-Governor George W. Bush to stay his execution so that a strand of hair from the crime scene could be subjected to a DNA test. The hair was the only physical evidence connecting Jones to the crime scene, a liquor store in which the owner was killed during a robbery. The forensic hair "match" was the key evidence cited by the Texas Court of Criminal Appeals in upholding Jones' sentence by a vote of

3-2. Last November, DNA tests were finally performed on the hair and confirmed that it belonged to the victim rather than Jones. That fact does not conclusively prove Jones' innocence, but it illustrates a failed system. Documents obtained by the Innocence Project show that Governor Bush's attorneys didn't inform him that Jones was seeking DNA testing, or that the testing might exonerate him.

U.S. SUPREME COURT RECENT DECISIONS

Harrington v. Richter, 131 S. Ct. 770 (2011). In this potentially damaging non-capital case from California, the Supreme Court angrily reversed the Ninth Circuit's grant of habeas relief. The case involved a shooting in which serology and blood-spatter evidence proved to be important at trial, but, at least according to the court, that importance was not necessarily foreseeable to a reasonable attorney under the circumstances. The court made a number of unfortunate observations in the course of its opinion. First, the court ruled that the "deference" provisions of 28 U.S.C. § 2254(d) apply on habeas review even if the state court does not explain its reasoning. Second, the court ruled that, under AEDPA, a reviewing federal court cannot simply resolve the merits and then comment that the state court's contrary conclusion was "unreasonable," as the Ninth Circuit did. Rather, the federal court must ascertain "what arguments or theories" *could* have supported the denial of relief, and then ask whether "fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this court." Third, the court again emphasized that habeas relief requires the state court's ruling to have been "unreasonable" as well as "incorrect." "A state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Fourth, on the merits of Richter's *Strickland* claim, the court ruled that it is permissible to consider strategic considerations beyond those specifically articulated by trial counsel, at least so long as the reviewing court does not indulge a "'post hoc rationalization' for counsel's decisionmaking that contradicts the available evidence of counsel's actions," quoting (and distinguishing) *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003). Fifth and finally, the court acknowledged that *Strickland* prejudice does not require a showing that the jury would have "probably" reached a different verdict but for counsel's errors, but, nevertheless, a substantial showing is required: "The difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters only in the rarest case."

Premo v. Moore, 131 S. Ct. 733 (2011). Again rebuking the Ninth Circuit, the Supreme Court reversed the grant of habeas relief in this Oregon non-capital case. On counsel's advice, Moore took a no contest plea to felony murder and was sentenced to 300 months; he thereby avoided a potential conviction and sentence of death or LWOP for aggravated murder. At issue was Moore's confession to police, which counsel did not seek to suppress before advising Moore to plead guilty. Moore claimed that counsel was ineffective, and the state court ruled that it would have been "fruitless" for counsel to file a motion to suppress. Among other problems, Moore made two confessions to his brother as well as the girlfriend of his accomplice. In reversing the Ninth Circuit, the Supreme Court observed that it was unclear whether the state court ruled that counsel performed reasonably under *Strickland*, or whether there was no prejudice. Nevertheless, under 28 U.S.C. § 2254(d), habeas would be unavailable unless a federal court could conclude "that both findings would have involved an unreasonable application of clearly established federal law." The court went on to caution against unduly invasive judicial scrutiny of plea-bargaining decisions. "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place." On the merits, Moore could not demonstrate either showing required by *Strickland*: it was not unreasonable for counsel to advise Moore to accept a plea to a lesser offense even without certainty of his confession's admissibility, and there was no showing that Moore would have proceeded to trial but for counsel's alleged error, in light of Moore's other two confessions and the evidence corroborating them.

Walker v. Martin, 131 S. Ct. 1120 (2011). In this non-capital case, a unanimous Supreme Court ruled that California's indefinite "reasonableness" requirement governing the timeliness of state habeas actions is "adequate" to support the procedural default of Martin's claims. California imposes no particular time limit for post-conviction petitions, instead requiring (by decisional law), that they be filed "as promptly as the circumstances allow." [In capital cases, by contrast, a California habeas petition is presumed to be timely if filed within 180 days after the final brief on direct appeal]. Relying on *Beard v. Kindler*, 130 S. Ct. 612 (2009), the court reiterated its holding that a discretionary rule may be "adequate" for purposes of federal habeas review. Although the rule has to be "firmly established," the use of imprecise principles such as "reasonable time" or "substantial delay" simply reflected "indeterminate language [that] is typical of discretionary rules." The court also rejected the Ninth Circuit's holding that the California "rule" is not regularly followed. It was not sufficient that state court rulings show "seeming inconsistencies," such as allowing slightly different lengths of time in which to seek relief. The dispositive question, it appears, is whether the state court "exercised its discretion in a surprising or unfair manner." In Martin's case, he sought post-conviction relief five years after the fact, and during a stay-and-abeyance of his federal habeas petition. Such delay

is rather straightforwardly untimely under the case law governing California's "rule."

Wilson v. Corcoran, 131 S. Ct. 13 (2010). In this protracted capital habeas case from Indiana, the Supreme Court reversed the Seventh Circuit for ordering penalty phase relief in the absence of any finding that the prisoner's sentence violates federal law. The Seventh Circuit ruled that the trial court impermissibly relied on non-statutory aggravating circumstances in sentencing the defendant to death. Such aggravators cannot be weighed under Indiana law, but the Indiana Supreme Court allowed the trial judge to clarify his comments at sentencing, and it upheld the death sentence after a remand, reasoning that the judge did not rely on the non-statutory aggravators in sentencing Corcoran to death. The Seventh Circuit ordered habeas relief, but without expressly holding that the trial judge's error violated due process, the Eighth Amendment, or any other aspect of federal law. It did not suffice for the Seventh Circuit to rule that the state supreme court unreasonably determined the facts under 28 U.S.C. § 2254(d)(2). That provision, the Supreme Court observed, does not "repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law." The court remanded the case to the Seventh Circuit without weighing in on the merits.

Swarthout v. Cooke, 131 S. Ct. 859 (2011). California law provides that the parole decision of the state's Board of Prison Terms must be upheld in court if there is "some evidence" to support it. The Supreme Court held that federal habeas corpus relief does not lie when prisoners who have been denied parole claim that "no evidence" supports the denial. Rather, it suffices as a matter of due process if the prisoners were allowed to speak at their parole hearings and contest the evidence against them, and were then given a statement of reasons why parole was denied. *See Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 16 (1979). The "some evidence" question is merely a matter of state law, the court ruled.

Michigan v. Bryant, 131 S. Ct. 1143 (2011). The Supreme Court held, 7-2, that a shooting victim's dying statements to police officers, even though elicited by the officers' questions and even though the victim identified his killer, were "nontestimonial" under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. 813 (2006). Therefore, the court ruled, the admission of those statements at Bryant's trial did not violate the Confrontation Clause of the Fifth Amendment. The majority reasoned that the officers' "primary purpose" was to address an emergency situation rather than to initiate a criminal prosecution, that the emergency was ongoing because the killer had a gun, and that the interview lacked the formality of a scheduled encounter at a police station.

CERT GRANTED

Fowler v. United States, No. 10-5443. The court granted certiorari to decide whether, for purposes of the federal murder statute that forbids murder to prevent the victim from reporting a federal crime to a federal officer, the government must prove that the victim actually intended to report the crime to a federal officer.

Missouri v. Frye, No. 10-444. On the State's petition from the Missouri Court of Appeals' grant of post-conviction relief, the Supreme Court agreed to consider the following issue: "Can a defendant who validly pleads guilty successfully assert a claim of ineffective assistance of counsel by alleging instead that, but for counsel's error in failing to communicate a plea offer, he would have pleaded guilty with more favorable terms?". The court added an additional question to be reviewed: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"

Lafler v. Cooper, No. 10-209. In this non-capital case form Michigan, the court will consider this issue: "Is a state habeas petitioner entitled to relief where his counsel deficiently advises him to reject a favorable plea bargain the but defendant is later convicted and sentenced pursuant to a fair trial?" The court added the same question that it added in the *Frye* case from Missouri: "What remedy, if any, should be provided for ineffective assistance of counsel during plea bargain negotiations if the defendant was later convicted and sentenced pursuant to constitutionally adequate procedures?"

Bullcoming v. New Mexico, No. 09-10876. The court granted certiorari to decide whether it violates the Confrontation Clause for a trial judge to admit the testimony of a crime lab supervisor to discuss a forensic test that the supervisor did not personally conduct or observe.

Howes v. Fields, No. 10-680. On the state of Michigan's petition from the Sixth Circuit's grant of habeas relief, the Supreme Court granted certiorari on the following issue: "Whether this Court's clearly established precedent under 28 U.S.C. § 2254 holds that a prisoner is always 'in custody' for purposes of *Miranda* any time that prisoner is isolated from the general prison population and questioned about conduct occurring outside the prison regardless of the surrounding circumstances."

J.D.B. v. North Carolina, No. 09-11121. The court granted certiorari to consider the following question: "Whether a court may consider a juvenile's age in a *Miranda* custody analysis in evaluating the totality of the circumstances and determining whether a reasonable person in the juvenile's

position would have felt he or she was not totally free to terminate the police questioning and leave." The case involves a defendant who was thirteen at the time of questioning.

Tolentino v. New York, No. 09-11556. In this case the court will decide whether the Fourth Amendment requires the exclusion of the defendant's driving record, when police consulted that record only after making an illegal stop.

Davis v. United States, No. 09-11328. In this felon-in-possession case, the police officers' search was legal under the Fourth Amendment at the time it was conducted. Nevertheless, by the time of trial, the law changed so as to make clear that the search was illegal. *See Arizona v. Gant*, 129 S. Ct. 1710, 1723 (2008) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."). The Supreme Court will decide whether such evidence must be suppressed at trial.

CERT DENIED

Williams v. Hobbs, 131 S. Ct. 558 (2010). Justice Sotomayor, joined by Justice Ginsburg, issued a spirited dissent from the court's denial of certiorari, and thus, its refusal to review the Eighth Circuit's misguided reversal of the district court's grant of sentencing phase relief to Arkansas prisoner Marcel Williams. *See Williams v. Norris*, 576 F.3d 850 (8th Cir. 2009). The Eighth Circuit reversed the district court for granting a hearing, even though the state never objected to a hearing in the district court.

Bradford v. Thaler, No. 09-11519, ***Foster v. Texas***, No. 10-8317, *Cook v. Arizona*, No. 10-7210. In these cases, the court denied certiorari to consider whether ineffectiveness of state post-conviction counsel qualifies as "cause" on federal habeas review. The Supreme Court had granted stays of execution to Messrs. Foster and Bradford, which were vacated after the cert denials. Cleve Foster is now scheduled for execution on April 2, 2011. Gayland Bradford's execution has not been rescheduled as of this writing.

EIGHTH CIRCUIT DECISIONS

Worthington v. Roper, 631 F.3d 487 (8th Cir. 2011). The Eighth Circuit reversed the district court's grant of relief on a *Wiggins* claim in this capital case from St. Charles County. The court faulted the district court for conducting a *de novo* review of the claim. Although the claim was not resolved by the Missouri Supreme Court on Worthington's post-conviction appeal, the Eighth Circuit concluded that the trial court had rejected the claim under Rule 24.035, and that the trial court's ruling was itself subject to AEDPA. On the merits, the court rejected Worthington's claim that trial counsel failed to provide two mental health experts with critical information concerning Worthington's background, including the fact that Worthington was diagnosed with PTSD as a teenager, had been treated for bipolar disorder, and thus, may have committed the murder and rape at issue during a manic episode. Purporting to distinguish cases such as *Wiggins*, *Williams v. Taylor*, and *Rompilla v. Beard*, the court concluded that counsel reviewed and provided the experts with at least *some* substantial material, and thereafter reasonably decided not to present mitigating evidence concerning mental health, when neither pretrial expert could have provided a helpful diagnosis. On Worthington's cross-appeal, the court rejected his claims that counsel performed ineffectively by not calling his parents as mitigation witnesses and by not objecting to the prosecution's failure to disclose a witness who described a previous attempted rape.

Clay v. Bowersox, 628 F.3d 996 (8th Cir. 2011). Six days before Richard Clay's then-scheduled execution of January 12, 2011, the Eighth Circuit rejected Clay's motion to stay his execution pending his supplemental petition for habeas corpus. The supplemental petition argued that the Missouri Supreme Court violated Clay's due process rights by refusing to reconsider the proportionality of Clay's death sentence in the manner prescribed by *State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. 2010) (holding that the court's proportionality review must consider similar cases in which the defendant was sentenced to life). The court agreed with the Missouri Supreme Court's ruling that it was sufficient that Clay "received proportionality review in the manner provided by law at the time of that review" on direct appeal. The court declined to grant a stay of execution or even a certificate of appealability, opining that a state court "is not constitutionally compelled to make retroactive its new construction of a state statute." The court made this ruling notwithstanding a different panel's *grant* of a certificate of appealability, on essentially identical grounds, to Missouri inmate Paul Goodwin (see Case No. 10-2816). Fortunately, Mr. Clay's sentence was later commuted to life imprisonment by Governor Jay Nixon.

Cole v. Roper, 623 F.3d 1183 (8th Cir. 2010). By a vote of 2-1, the Eighth Circuit upheld the denial of habeas relief to Missouri death row prisoner Andre Cole, who was convicted of first degree murder in the stabbing death of his ex-wife's friend in St. Louis County. The court rejected a number of claims, including a *Batson* claim involving the State's exclusion of all three African-American veniremembers who remained on the panel after challenges for cause, a *Wiggins* claim involving trial counsels' failure to investigate and present evidence that Mr. Cole suffered from an extreme mental and emotional disturbance at the time of the crime, and also a claim that trial counsel performed ineffectively by not

investigating and presenting evidence of Mr. Cole's extraordinarily favorable conduct while he awaited trial for almost two years in the county jail. Judge Bye dissented on the latter issue, noting that the evidence would have answered the prosecution's theory that Mr. Cole was dangerous, incorrigible, and had demonstrated through previous crimes a refusal to "play by the rules" of the criminal justice system (including the state's argument that Mr. Cole had a prior conviction for failing to return to confinement after a work release shift).

Goodwin v. Roper, Eighth Circuit Case No. 10-2816 (unpublished order dated February 28, 2011). In this capital case from St. Louis County, the Eighth Circuit initially granted a certificate of appealability to death-sentenced prisoner Paul Goodwin on the sole ground that the Missouri Supreme Court impermissibly denied him full proportionality review on direct appeal, in light of the state court's later recognition that its statute requires the court to consider similar cases in which the defendant was sentenced to life. The state moved to quash the COA following the Eighth Circuit's opinion in *Clay v. Bowersox*, 628 F.3d 996 (8th Cir. 2011). The court summarily granted that motion, and along with it, denied Goodwin's motion to expand the COA to include a claim that he was entitled to a jury determination of whether he is mentally retarded. Although Goodwin is at liberty to seek rehearing, he stands to become the first Missouri capital prisoner to be denied appellate habeas review since James Johnson, who was executed in 2002. That possibility is made all the more offensive by the fact that Goodwin has a colorable claim of mental retardation, supported by expert testimony.

Rankin v. Bowersox, 396 Fed. Appx. 325 (8th Cir. 2010). The court dismissed the state of Arkansas' interlocutory appeal of the district court's stay-and-abeyance order as to Arkansas death row inmate Roderick Rankin. The state argued that the district court erred by staying the federal habeas petition, because the claims being litigated in state court are procedurally defaulted. Adhering to its opinion in *Howard v. Norris*, 616 F.3d 799, 802-03 (8th Cir. 2010), the court ruled that it lacks jurisdiction under the collateral order doctrine, because the state's argument of procedural default can be addressed after final judgment.

Jones v. Norman, — F.3d —, No. 10-1614, 2011 WL 488744 (8th Cir. Feb. 14, 2011). The Eighth Circuit upheld the grant of habeas relief on Jones' *Faretta* claim in this Missouri case in which the prisoner was sentenced to thirty years for robbery. The state argued that Jones defaulted the claim by not asserting it in his motion for new trial. In the course of its ruling, the Eighth Circuit held that the state, which argued default in response to Jones' initial habeas petition, waived the issue by not asserting it after Jones filed an amended habeas petition, and despite being invited by the district court to address "the merits . . . in addition to any procedural default issues which may be relevant." The court observed that "When a state fails to advance a procedural default argument, such argument is waived", quoting *Robinson v. Crist*, 278 F.3d 862, 865 (8th Cir. 2002). Although the court has authority to raise default sua sponte in the face of an "obviously inadvertent omission" or an "obvious computation error," the court declined to do so in this case. The court went on to hold that the state court unreasonably applied *Faretta* in denying Jones the right to represent himself.

Nunley v. Bowersox, No. 99-8001-CV-W-FJG, 2010 WL 4272474 (W.D. Mo. Oct. 18, 2010). U.S. District Judge Fernando Gaitan stayed the scheduled execution of death-sentenced inmate Roderick Nunley. Nunley filed a supplemental federal habeas petition alleging inter-related claims under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hicks v. Oklahoma*, 447 U.S. 343 (1980). Nunley pleaded guilty, was sentenced to death, and had his death sentence vacated on account of the trial judge's drunkenness. On retrial, Nunley was again sentenced by a judge instead of a jury, and again, he was sentenced to death. He eventually filed a motion to recall the mandate in the Missouri Supreme Court, arguing that *Ring* entitled him to jury sentencing, and that *Ring* applies retroactively in Missouri under *State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003). The Missouri Supreme Court summarily overruled the motion "on the merits." Judge Gaitan ruled that Nunley was entitled to a stay, because it was not clear whether the Missouri Supreme Court simply held that Nunley's guilty plea made *Ring* inapplicable, or, instead, whether the court was treating Nunley differently from other *Ring* claimants under *Whitfield*. The court stayed Nunley's execution pending such clarification from the Missouri Supreme Court, which itself vacated its execution warrant and ordered supplemental briefing on Nunley's claims. The state failed in its motions asking the Eighth Circuit and the U.S. Supreme Court to vacate Judge Gaitan's stay.

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Wiley v. Epps, 625 F.3d 199 (5th Cir. 2010). The Fifth Circuit upheld the district court's grant of *Atkins* relief to a death-sentenced prisoner from Mississippi. The court first held that the Mississippi Supreme Court violated due process by not granting an evidentiary hearing despite Wiley's prima facie showing of mental retardation, and by departing from its own precedent. Among other rulings, the state court held that Wiley could not possibly be mentally retarded, in light of mitigating trial evidence that he held steady employment, did household chores, could fix cars, and babysat children. Because the state court's ruling was itself a violation of due process, as well as an unreasonable application of *Atkins*, the court upheld the district court's determination that the claim should be reviewed *de novo*, and also the district court's grant of a hearing. On the merits, the Fifth Circuit ruled that the district court's finding of mental retardation was not clearly erroneous, despite the fact that one of four examiners

concluded that Wiley is not mentally retarded and scored his IQ at 80. The opinion has an interesting discussion of the Flynn effect, but the court ruled that Wiley is mentally retarded with or without considering the effect.

Pavatt v. Jones, 627 F.3d 1336 (10th Cir. 2010). The Tenth Circuit upheld the denial of a stay of execution to an Oklahoma prisoner who challenged that state's new execution protocol, which substituted the barbiturate pentobarbital for the newly-unavailable anesthetic sodium thiopental. The court denied a stay under *Baze v. Rees*, 553 U.S. 35 (2008), crediting the district court's findings that pentobarbital was sufficiently certain to make the prisoner unconscious during the administration of the other drugs, and that the called-for dosage of pentobarbital is itself fatal.

Detrich v. Ryan, 619 F.3d 1038 (9th Cir. 2010). In the course of granting *Wiggins* relief, the Ninth Circuit ruled that the Arizona Supreme Court's ruling reflected an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). Specifically, the state court unreasonably found that a neuropsychological report submitted on postconviction review (accompanied by volumes of new evidence describing the defendant's abusive childhood, brain damage, and neuropsychological deficits), was "not significantly different" from three state-produced reports presented at trial. Based on this error, the Ninth Circuit went on to review Detrich's claim *de novo*, rather than assessing whether the state court's ruling was *also* unreasonable in law under 28 U.S.C. § 2254(d). The Ninth Circuit observed that the "plain language . . . does not require that a state court decision involve *both* an unreasonable determination of fact *and* an unreasonable application of law before we may grant relief."

Lambert v. Beard, — F.3d —, No. 07-9005, 2011 WL 353209 (3rd Cir. Feb. 7, 2011). The Third Circuit granted guilt-phase relief on a *Brady* claim in this Pennsylvania capital case involving a robbery-gone-bad at a tavern. The prosecution's key witness, who was spared the death penalty in return for his testimony, gave a statement to police identifying an additional participant in the robbery, beyond those described at trial. The statement was not discovered until post-conviction review. The Pennsylvania Supreme Court denied *Brady* relief, reasoning that the witness was already comprehensively impeached at trial, and therefore, the suppressed evidence wasn't "material." In particular, the witness testified in return for favorable treatment from the state, and he was thoroughly discredited with numerous prior inconsistent statements. The Third Circuit granted relief, holding that the state court unreasonably applied *Brady*. The state court unreasonably held that *Brady* doesn't apply whenever the additional impeachment evidence affects an already-impeached witness. To the contrary, suppressed evidence may be material under *Brady* when it discredits the state's case in some new way that it hasn't already been discredited. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 702-03 (2004) (*Brady* relief despite fact that witness was heavily impeached at trial, where jury was unaware of witness's status as a paid informant). The court noted the prosecution's own argument that the witnesses's various statements were consistent as to the two robbers inside the bar, which was the very "fact" that the suppressed evidence undermined.

Williams v. Ryan, 623 F.3d 1258 (9th Cir. 2010). In another *Brady* victory, the Ninth Circuit ordered an evidentiary hearing in this Arizona capital case. The prosecution suppressed certain letters written by a prisoner, suggesting that the victim was killed by someone that Williams hired rather than by Williams himself. The same letter mentioned two witnesses to the killing, who saw the alternative suspect dispose of the body. Those same witnesses later gave accounts that appeared to question whether Williams was involved in the murder at all. Under these circumstances, the Ninth Circuit held that the district court erred by denying a hearing on the claim. Even though Williams could be as fully liable for murder under Arizona law for hiring a murder as for carrying it out, the suppressed prison letters – when combined with the eyewitness accounts that stemmed from further investigation – cast sufficient doubt on Williams' conviction to require a hearing. The court also faulted the district court for ruling that the eyewitnesses were lacking in credibility, but without conducting a hearing to determine their credibility. The Ninth Circuit also granted sentencing-phase relief on separate grounds. The sentencing court refused to consider evidence of Williams' cocaine addiction, finding that there was no causal connection between the addiction and the crime. The Arizona Supreme Court upheld this ruling, which, the Ninth Circuit held, violates the rule of *Lockett*/*Edddings*, as well as *Tennard v. Dretke*, 542 U.S. 274 (2004), and *Smith v. Texas*, 543 U.S. 37 (2004).

In re Gonzalez, 623 F.3d 1242 (9th Cir. 2010). In this capital habeas case, the Ninth Circuit issued a writ of mandamus to require the district court to conduct a hearing to determine the petitioner's competence to proceed. In a previous opinion, *Rohan ex rel Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003), the court held that a death-sentenced petitioner is entitled to a stay if incompetent, so long as he or she "raises claims that could potentially benefit from his ability to communicate rationally." The district court in this case ruled that all of Gonzalez's claims were wholly "record-based," and thus, his competent participation was not necessary. The Ninth Circuit disagreed. Citing its later opinion in *Nash v. Ryan*, 581 F.3d 1048 (9th Cir. 2009), the court observed that even a death-sentenced habeas appellant is entitled to a stay in order to determine which claims to assert and emphasize. The court reasoned that *Nash* applies in the district court, so that a stay is required for an incompetent prisoner even if all claims are "record-based," at least when any claim "might" benefit from rational communication between the prisoner and counsel. That test was met in this case, considering Gonzalez's habeas claim that the trial judge should have recused himself because he was openly hostile to the defendant.

Henderson v. Thaler, 626 F.3d 773 (5th Cir. 2010). The Fifth Circuit held that there is no "innocence of the death penalty" exception to the AEDPA statute of limitations. It therefore upheld the denial of relief to a Texas death-sentenced prisoner despite the prisoner's colorable (and untimely) *Atkins* claim.

Lopez v. Trani, 628 F.3d 1228 (10th Cir. 2010). Recognizing some inconsistencies in the court's unpublished opinions, the Tenth Circuit "expressly" held that a showing of the prisoner's actual innocence can be a basis for equitably tolling the statute of limitation, whether or not the prisoner was "diligent" in showing his innocence. The court went on to deny a certificate of appealability and dismiss Lopez's appeal, thereby upholding his Colorado rape conviction.

Houck v. Stickman, 625 F.3d 88 (3rd Cir. 2010). In this non-capital habeas case, the Third Circuit joined the Seventh Circuit in rejecting the Eighth Circuit's restrictive gloss on the *Schlup* "miscarriage of justice" exception. Under *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997), evidence of the prisoner's innocence may be considered "only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." The Third Circuit accepted *Amrine*, but with the "narrow limitation" that "if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence." The court went on to reject Mr. Houck's showing of innocence.

Quezada v. Smith, 624 F.3d 514 (2nd Cir. 2010). In this procedurally interesting non-capital case, the Second Circuit authorized a New York prisoner to file a second or successive habeas petition attacking his conviction of second-degree murder. The prisoner offered evidence that another person had admitted to taking part in the murder, and that Quezada was not the shooter. The Second Circuit allowed Quezada to proceed on two separate claims for successive habeas relief: first, that the prosecution *unknowingly* relied on perjured eyewitness testimony, in violation of the Second Circuit's ruling in *Sanders v. Sullivan*, 863 F.3d 218 (2nd Cir. 1998), and second, that the prosecution violated *Brady* and *Giglio* by not disclosing evidence that a police detective had coerced the sole trial eyewitness to testify as he did. The court rejected the state's argument that the first ground did not rest on "clearly established federal law, as determined by the U.S. Supreme Court" under 28 U.S.C. § 2254(d)(1). That question goes to the merits of the claim and whether habeas relief may ultimately issue, and not to an appellate court's narrow gatekeeping duties under 28 U.S.C. § 2244(b). Similarly unpersuasive was the state's argument that the eyewitnesses's recantation was "unreliable," because, again, Quezada need only make a "prima facie" showing of meeting the statute's requirements, including the requirement of "clear and convincing evidence" that no reasonable jury would find him guilty.

United States v. Darryl Lamont Johnson, No. 02-C-6988 (N.D. Ill. Dec. 13, 2010) (unpublished memorandum and order). The district court granted 2255 relief to federal death row inmate Darryl Johnson, who was convicted for ordering a murder of someone assisting in a federal criminal investigation, and ordering another murder in furtherance of a continuing criminal enterprise. At trial, the defense tried to persuade the jury that Johnson would not be a continuing threat, and that he would pose no harm to anyone else if he were placed permanently in the control unit of ADX-Florence. The government rebutted this evidence. It called a federal prison warden to testify that gang leaders like Johnson are usually placed in general population, that the BOP cannot house prisoners in strict conditions indefinitely, and that a prisoner cannot be assigned to the Florence control unit based solely on the offenses of conviction. The court held that defense counsel was ineffective for not discovering and presenting readily available evidence to disprove the government's testimony. In particular, the BOP may employ Special Administrative Measures to control the conditions of confinement. *See* 28 C.F.R. § 501.3(a). Also, sentencing courts may order restrictions on the defendant's communication and associations as part of a sentence under 18 U.S.C. § 3582(d). The court also observed that future dangerousness was a significant issue at trial, that it is essentially always at issue in death penalty trials, and that the jury in a similar federal case (in Maryland) had imposed life when informed of the facts that Johnson's counsel failed to discover.

MISSOURI SUPREME COURT DECISIONS

Johnson v. State, — S.W.3d —, No. SC90582, 2011 WL 797407 (Mo. Mar. 1, 2011). Following Ernest Johnson's third penalty phase trial in this case involving three murders at a convenience store, the Missouri Supreme Court affirmed the denial of post-conviction relief under Rule 29.15. At trial, two experts testified that Johnson is mentally retarded, but the jury rejected this claim. The Supreme Court rejected Johnson's argument that counsel were ineffective for relying on Dr. Dennis Keyes, despite the Court's earlier criticism of Dr. Keyes' conclusions in *Goodwin v. State*, 191 S.W.3d 20, 32 (Mo. 2006). The court reasoned that counsel could reasonably rely upon Dr. Keyes, even though his conclusions were rejected on different grounds in a different case. Among other rulings, the court also concluded that counsel reasonably declined to pursue a theory that Johnson committed the robbery and murders under the influence of another individual, and that death penalty is sought and imposed arbitrarily in Boone County.

State v. Andrews, 329 S.W.3d 369 (Mo. 2010). By a vote of 4-3, the Missouri Supreme Court upheld the mandatory life sentence imposed upon a juvenile offender for the first-degree murder of a police officer. The majority reasoned that *Florida v. Graham*, 130 S. Ct. 2011 (2010), implicitly recognizes that an LWOP sentence is not "cruel and unusual" for a minor who is convicted of a homicide. Judges Wolff, Stith, and Teitelman dissented, reasoning that *Graham*'s prohibition of LWOP sentences for non-homicide offenses does mean that the decision *permits* such sentences for homicides. Judge Wolff's dissent, in particular, engages in a lengthy examination of why such sentences offend society's "evolving standards of decency" under the Eighth Amendment. Judge Wolff also noted *Graham*'s remark that age is "relevant" under the Eighth Amendment, and that laws of criminal procedure must take it into account (a failing remedied, in the majority's view, by the fact that a circuit court must consider a juvenile defendant's age before certifying him or her to stand trial as an adult). Judge Stith likewise opined that the *jury* must itself be able to consider and give effect to a juvenile defendant's age.

Hoskins v. State, 329 S.W.3d 695 (Mo. 2010). In this non-capital case, the Missouri Supreme Court clarified that "plain error" review is not available on post-conviction appeals under Rules 24.035 and 29.15. Both rules contain a provision requiring the movant to declare that he or she waives all known claims that are not specifically listed, and also that the rules of procedure govern post-conviction cases "insofar as applicable." The court reasoned that the "plain error" provision of Rule 84.13, which allows an appellate court to recognize unpreserved claims of error in order to prevent a miscarriage of justice, is inconsistent with the plain language of Rules 24.035 and 29.15. Hoskins' claim involved his contention that his sentence exceeded that allowed by law. Fortunately for Mr. Hoskins, the court suggested that he could bring the claim on habeas corpus.

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

State v. Mata, 790 N.W.2d 716 (Neb. 2010). Reversing the trial court's denial of death-sentenced prisoner Raymond Mata's motion for post-conviction relief, the Nebraska Supreme Court ruled that Mata was entitled to the appointment of counsel as well as leave to amend his pro se motion. The court observed that an indigent defendant is entitled to appointment of counsel on post-conviction review when the record shows a "justiciable issue of law or fact," and it stated that leave to amend should be freely granted in circumstances such as Mata's.

Wooten v. State, — S.W.3d —, No. CR95-975, 2010 WL 4909670 (Ark. Dec. 2, 2010). By a vote of 5-2, the Arkansas Supreme Court granted death-sentenced prisoner Jimmy Don Wooten's motion to recall the mandate, thereby allowing Mr. Wooten to proceed with a second motion for post-conviction relief. On Wooten's initial Rule 37 proceedings, counsel presented no actual evidence to support a claim that trial counsel was ineffective during the penalty phase. That same attorney had been disbarred in Oklahoma, and although he was subject to automatic disbarment in Arkansas, no petition to disbar him had been filed at the time. Later, federal habeas counsel unearthed significant evidence of Wooten's troubled background, including his alcoholic father's extreme and unrelenting violence toward his wife and children, Wooten's PTSD with dissociative features and organic brain damage, and Wooten's lifelong history of cognitive problems. The Eighth Circuit declined to consider this evidence, ruling that the claim was unexhausted. *See Wooten v. Norris*, 578 F.3d 767 (8th Cir. 2009). On Wooten's subsequent motion to recall the mandate, a majority of the Arkansas Supreme Court ruled that Wooten's case was distinguishable from others in which similar relief had been granted, but nevertheless, that Wooten suffered a defect in the appellate process because he did not verify or authorize his post-conviction motion. That failure would warrant dismissal in a non-capital case, but "in this narrowest of circumstances where the death penalty is involved," fundamental fairness required that Wooten be permitted to seek additional post-conviction relief. Concurring, Justice Brown opined more fully that post-conviction counsel's disbarment in Oklahoma left Wooten essentially without counsel on his original Rule 37 motion, and that Wooten was entitled to recall of the mandate under the reasoning of *Lee v. State*, 238 S.W.3d 52 (Ark. 2006) (post-conviction counsel intoxicated during hearing and otherwise).

Echols v. State, — S.W.3d —, No. CR 08-1493, 2010 WL 4353535 (Ark. Nov. 4, 2010). In the infamous "West Memphis 3" case, the Arkansas Supreme Court reversed the trial court's denial of relief under the DNA testing statute, and remanded for a hearing and other proceedings. Initial DNA testing under the statute, including materials from two hairs and a penile swab of one of the victims, showed DNA that was inconsistent with defendants Damien Echols, Charles Baldwin, and Jessie Miskelley, and consistent with one of the victim's stepfather and friend. The court ruled that the trial court could not permissibly deny further proceedings on the grounds that the testing was "inconclusive" in the sense of not completely resolving the defendants' legal claim of innocence, as opposed to scientifically "inconclusive" under the statute. The trial court also erred by not considering other exculpatory evidence, because the statute requires the court to consider the test results together with "all other evidence in the case regardless of whether the evidence was introduced at trial." Finally, it is not necessary for Echols and the other defendants to conclusively establish their innocence; instead, it suffices to "establish by compelling evidence that a new trial would result in an acquittal." In separate cases, the court granted parallel

relief to Mr. Echols' non-capitally sentenced codefendants: Misskelley and Baldwin.

Lacy v. State, — S.W.3d —, No. CR-09-1340 (Ark. Dec. 2, 2010). In this direct appeal, the Arkansas Supreme Court affirmed Brandon Lacy's capital murder conviction and death sentence, imposed in Benton County. The prosecution's evidence was that Lacy beat his ex-wife's boyfriend with a fire poker, slit his throat, and then set him and his house on fire. Among the claims rejected by the court were Lacy's contentions that the evidence did not show an underlying robbery for purposes of capital murder, that the trial court wrongly denied admission of wide-ranging defense evidence, and that the state violated *Brady* by not disclosing certain evidence suggesting that the victim may have been the initial aggressor.

Taylor v. State, — S.W.3d —, No. CR 10-50 (Ark. Nov. 18, 2010). The Arkansas Supreme Court affirmed Jason Taylor's convictions for capital murder and kidnapping, and the resulting death sentence, in this Saline County case. Among other arguments, the court rejected Taylor's claim that the evidence of kidnapping – and with it, the resulting conviction of capital felony murder – was insufficient because it relied almost solely on the testimony of an accomplice. The court observed, among other things, that the evidence was independently sufficient for a conviction of premeditated murder.

Isom v. State, 2010 Ark. 496 (Ark. Dec. 16, 2010) (unpublished). During the pendency of Kenneth Isom's capital Rule 37 appeal, the Arkansas Supreme Court declined to reverse the circuit court's order denying Mr. Isom the right to conduct further DNA testing on hair recovered from the vagina of the decedent's wife, who was raped during the crime. Initial DNA testing under Ark. Code Ann. 16-112-201-08 did not exclude Isom but showed that the probability of a DNA match for a non-relative was 1 in 580,000. Nevertheless, Isom presented evidence that he is related to two alternative suspects in the case. Both suspects' DNA is already in the State's database, and so Isom moved to have the hair re-tested, arguing that the initial test was "inconclusive" under the statute. The Supreme Court ruled that the trial court did not abuse its discretion. The statute provides that the court "may" permit further testing if the result is inconclusive, that the victim/witness positively and firmly identified Isom as her husband's killer at trial, that Isom otherwise has no statutory or constitutional "right" to DNA testing, and that the denial of further testing was not fundamentally unfair.

Anderson v. State, No. CR08-1464, 2010 WL 3915289 (Ark. Oct. 7, 2010). In the capital post-conviction appeal of Arkansas prisoner Justin Anderson, the Arkansas Supreme Court relieved appointed counsel of his duties. The court had previously ordered rebriefing in the case, because counsel's brief failed to "specifically articulate Anderson's allegations of error, support each allegation with applicable citation to recent authority, apply the authority cited to the facts of each claim, thoroughly analyze the issues, and advocate for a result that benefits Anderson." Counsel made only modest changes to the brief, which was deemed "woefully deficient," featuring arguments that were "undeveloped and included nothing but conclusory statements." The court appointed new counsel for Mr. Anderson, noting the "heightened standard of review" in death penalty cases, and that the purpose of Rule 37.5 is to ensure a "comprehensive state-court review of a petitioner's claims, thereby eliminating the need for multiple postconviction actions in federal court."

Fulgham v. State, 46 So.3d 315 (Miss. 2010). In this capital direct appeal, the Mississippi Supreme Court reversed the trial court for excluding testimony from a licensed social worker concerning her description of the defendant's social history, based on her interviews with family members as well as her review of relevant documents. The social worker would have described the defendant's lack of parental involvement, a family history of substance abuse, lack of fatherly input, and the defendant's love for her children despite her incarceration. Excluding this testimony was an abuse of discretion for several reasons. First, the testimony was outside the knowledge and understanding of the average layperson. Second, the testimony was not based on hearsay, because an expert may form an opinion based on evidence "of a type reasonably relied upon by experts in the particular field." Third, the evidence was mitigating, in the sense that it "relates to the character and background of the defendant and the circumstances surrounding the crime." The evidence in question "would have provided the jury with additional observations and a cohesive overview of the mitigation evidence."

State v. Gamble, — So.3d —, No. CR-06-2274, 2010 WL 3834280 (Ala. Crim. App. Oct. 1, 2010). The Alabama Court of Criminal Appeals partly affirmed and partly reversed the trial court's grant of post-conviction relief in this interesting death penalty case. It affirmed the trial court's grant of relief on a *Wiggins* claim, noting that trial counsel presented no mitigating evidence, conducted essentially no investigation, and failed to discover evidence that Gamble's father was an abusive and violent alcoholic, that both parents abandoned Gamble and his siblings, that the family home was impoverished and decrepit, that both parents were borderline mentally retarded, and that Gamble himself has an IQ of 77. But the court reversed the grant of relief on another ground, specifically, that Gamble should be sentenced to life because the sentence of his co-defendant – who was sixteen years old at the time of the crime – was reduced to life under *Roper v. Simmons*. The court rejected this basis of relief for several reasons. First, it ruled that proportionality review is properly conducted on direct appeal, and not by the trial court on post-conviction review. Second, it reasoned that a defendant is entitled to an individualized determination of his sentence.

Third, the court concluded that there is no constitutional right to proportionality review, and so Gamble's assertion of a new claim after his co-defendant's resentencing was simply not cognizable.

Wilson v. State, — So.3d —, No. CR-07-0684, 2010 WL 4380224 (Ala. Crim. App. Nov. 5, 2010). Despite the defendant's lack of a *Batson* objection during trial in this death penalty case, the Alabama Court of Criminal Appeals remanded for a *Batson* hearing on "plain error" review. Following its precedent, the court observed that "plain error" exists under *Batson* when the record "raise[s] an inference that the State engaged in purposeful discrimination in the exercise of peremptory challenges." On remand, the state (which joined the defendant's request for a remand) will have to explain its reasons for striking African-American veniremembers, and Wilson will then have "an opportunity to offer evidence showing that the State's reasons or explanations are merely a sham or pretext."

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