THE DEATH PENALTY LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE

March – April 2011

NOTEWORTHY NEWS

EXECUTION DATES IN NEBRASKA, ARKANSAS

The Nebraska Supreme Court scheduled an execution date against Carey Dean Moore for June 14, 2011. In doing so, the court rejected a challenge to the state's execution protocol as well as its legally dubious importation of thiopental manufactured in India (including the possibility that the drug is not actually thiopental). The court ruled that the challenge should be filed in a district court in the first instance, and that the court has no jurisdiction to entertain the case and to "remand" it for a hearing as Moore sought. Moore has since reasserted his claims in the Douglas County District Court, and has moved the state supreme court for a stay. If his execution were to be carried out as scheduled, it would be the first lethal injection in Nebraska, and the state's first execution of any kind since that of Robert Williams in 1997.

In Arkansas, Governor Mike Beebe scheduled the execution of Frank Williams for June 22, and that of Marcel Williams for July 12. The Arkansas Supreme Court has since stayed Frank Williams' execution, citing the pendency of Mr. Williams' motions to recall the mandate on his direct appeal and post-conviction proceedings, as to which the court has ordered full briefing and argument. The state high court has previously stayed other executions based on the pendency of a lethal injection challenge in the Pulaski County Circuit Court, concerning the constitutionality of the State's bizarre "Method of Execution Act." Since the time of the stay orders of several months ago, the circuit court has denied the state's motion to dismiss the case, thereby strengthening the case as well as the prisoners' arguments for a stay.

SUPREME COURT STAYS EXECUTIONS OVER ISSUE OF INEFFECTIVE POST-CONVICTION COUNSEL

On March 21, 2011, the Supreme Court granted certiorari in *Maples v. Thomas* (Case No. 10-63), to consider whether, or when, errors committed by post-conviction counsel may provide "cause" to overcome procedural defaults created by those errors. Two weeks later, the court stayed the Texas execution of Cleve Foster and the Arizona execution of Daniel Cook. Mr. Cook's execution was stayed pending his cert petition that raises issues similar to those in *Maples*. The more extraordinary stay was Foster's, which was granted on a petition for rehearing following the court's pre-*Maples* denial of his cert petition.

SCOTUS STIFFS DEATH ROW EXONEREE

In the unfortunate case of *Connick v. Thompson*, 131 S. Ct. 1350 (2011), a 5-4 majority of the Supreme Court vacated a $14 million jury award in favor of exonerated Louisiana death row inmate John Thompson, and against the prosecutors who suppressed the very evidence that exonerated him. The verdict reflects damages of $1 million for each year that Thompson spent on death row. A more detailed write-up of the *Connick* decision appears below. The reader is also referred to Mr. Thompson's moving article in the New York Times, describing his struggle. *See* John Thompson, *The Prosecution Rests, But I Can't*, New York Times, Apr. 9, 2011.

IN THIS ISSUE

LETHAL INJECTION DEVELOPMENTS

Lethal injection procedures remain in a state of continuing flux following Hospira's decision to cease manufacturing thiopental, which leaves the United States without any domestic or otherwise FDA-approved supplier of the drug.

Developments abroad – Following earlier exports that have come under legal attack, Britain has now blocked all exports of thiopental (and its frequent replacement, pentobarbital), pancuronium bromide, and potassium chloride to the U.S. The U.K. is also urging the European Union to adopt a similar ban, and Germany is supporting those efforts. The Danish manufacturer of pentobarbital insists that its product should not be used for executions, but thus far, it has refused to stop sales to the U.S. or to prisons, citing the drug's legitimate medical uses. Additionally, the company from India that sold Nebraska and South Dakota their supplies of thiopental has quit supplying the drug for that purpose, stating that "[W]e voluntary declare that we as Indian Pharma Dealer who cherish the Ethos of Hinduism (A believer even in non-livings (sic.) as the creation of God) refrain ourselves in selling this drug where the purpose is purely for Lethal Injection and its misuse."

DEA seizures – The Drug Enforcement Agency has seized the thiopental supplies of Georgia, Kentucky, Tennessee, and Alabama over concerns that all of these states violated the Controlled Substances Act through their means of importing thiopental. The DEA's actions stand in contrast to those of the FDA, which has assisted at least one state in importing thiopental, and which maintains that the integrity and effectiveness of execution drugs lies outside the agency's role of protecting the "public health." A helpful overview of these developments is available in a recent article: John Schwartz, *Seeking Execution Drug, States Cut Legal Corners*, New York Times, Apr. 13, 2011.

The transition to pentobarbital – An additional handful of states have now discontinued their use of thiopental, and have replaced the drug with the sedative pentobarbital, to be followed by pancuronium bromide and potassium chloride in a similar three-drug protocol. Mississippi, Alabama, Texas, South Carolina, and have announced such a change in recent weeks, while Arizona plans to switch to a one-drug protocol of pentobarbital. Oklahoma and Ohio have carried out executions using the drug; only the latter state and Washington employ a one-drug protocol as of this writing. Texas, for its part, has been criticized by the ACLU and Northwestern University's Center for International Human Rights. A report documents that the state regulates animal euthanasia procedures more stringently than human execution procedures. *See Regulating Death in the Lone Star State: Texas Law Protects Lizards from Needless Suffering, but not Human Beings*, available at www.deathpenaltyinfo.org.

ST. LOUIS COUNTY RANKS SIXTH IN U.S. EXECUTIONS

A recent study from Frank Baumgartner of the University of North Carolina has tracked all post-*Furman* executions according to the jurisdiction from which each execution originated as a criminal case. *See Where the Executions Are* (May 3, 2011), available at <<http://www.unc.edu/~fbaum/Innocence/Where-the-executions-are.pdf>>. St. Louis County has seventeen executions to its credit. That number is exceeded by only five other counties in the entire country: Harris County, Texas (Houston area, with 116 executions); Dallas County, Texas (Dallas area, with 44 executions); Oklahoma County, Oklahoma (Oklahoma City area, with 36 executions); Tarrant County, Texas (Fort Worth area, with 35 executions); and Bexar County, Texas (San Antonio area, with 31 executions). St. Louis County, then, represents somewhat of a northern border of super-numerary executions. Its total is not even approached by any county outside of the former Confederacy.

DALE HELMIG REMAINS A FREE MAN

The Western District Missouri Court of Appeals upheld the grant of habeas corpus relief to Dale Helmig, who in 1996 was wrongly convicted and sentenced to life imprisonment for the first degree murder of his mother, Norma Helmig. *See State ex rel. Koster v. McElwain*, — S.W.3d —, No. WD73211, 2011 WL 1119756 (Mo. App. W.D. Mar. 29, 2011). If it chooses, the State may retry Mr. Helmig within 180 days of the court's mandate. Declining to pass upon several additional grounds on which the circuit court had granted relief, the Court of Appeals upheld the writ on two particular grounds. First, the court agreed that the prosecution violated *Brady* by not discovering and disclosing that the victim had repeatedly called the police out of fear that her estranged husband – an alternative suspect – would injure or kill her. Second, Mr. Helmig's jury was provided, and considered, a map of the area where the crime was alleged to have occurred. The map was not admitted into evidence, and it was also probably inaccurate in its portrayal of the waterways in the area around where the victim's body was dumped during a period of severe flooding in 1993.

Helmig represents yet another rebuke of former congressman and GOP gubernatorial candidate Kenny Hulshof, who prosecuted the case while working as an assistant attorney general. Although the court noted the absence of evidence that the prosecution knew of Norma Helmig's complaints about her husband, it ruled that a prosecutor has an obligation to learn of exculpatory evidence known to the investigating police officers (who themselves misleadingly testified that there were no such complaints of domestic violence). In January, Governor Jay Nixon commuted the death sentence of Richard Clay, who was co-prosecuted by Hulshof, and who

still claims that he is innocent of murder and was convicted due to prosecutorial misconduct. In 2009, Hulshof prosecutee Josh Kezer was released after spending sixteen years behind bars, following a court's ruling that the prosecution withheld exculpatory evidence from the defense. Hulshof's conduct is also at issue in a pending habeas corpus case in the Missouri Supreme Court, in which a juvenile was indicted for murder before he was certified to stand trial as an adult. *See State ex rel. Woodworth v. Denney*, No. SC91021. Misconduct has been found in numerous other cases prosecuted by Mr. Hulshof: *State v. Storey*, 901 S.W.2d 886 (Mo. 1995); *State v. Phillips*, 940 S.W.2d 512 (Mo. 1997); *State v. Clay*, 975 S.W.2d 121 (Mo. 1998); and *Copeland v. Washington*, 232 F.3d 969 (8th Cir. 2000).

U.S. SUPREME COURT RECENT DECISIONS

Cullen v. Pinholster, 131 S. Ct. 1388 (2011). The Supreme Court reversed the Ninth Circuit's grant of habeas relief in this disheartening capital case from California. As a threshold matter, a majority of the court ruled that, when new evidence is presented on federal habeas review, the federal court must ignore the evidence when deciding whether the state court's adjudication of the claim is "contrary to" or an "unreasonable application of" Supreme Court precedent under 28 U.S.C. § 2254(d). One small bit of consolation is the majority's acknowledgment, in footnote 10, that new evidence may occasionally create a new "claim" – subject to *de novo* review – such as when the prisoner discovers additional instances of suppressed *Brady* material. On the merits, the court ruled that Pinholster was not entitled to habeas relief on his *Wiggins* claim as developed on the state court record. The court reasoned that trial counsel reasonably opted for a strategy of garnering sympathy for Pinholster's mother, while also hoping that the trial court would strike the state's aggravating evidence for non-disclosure to the defense. Even though that hope proved to be empty, the court surmised from the record that trial counsel were actually prepared to submit the full mitigation case that they wished, that the testimony of Pinholster's mother and brother adequately conveyed the defendant's history of physical abuse, that the "family sympathy" theory was reasonable in light of the unsympathetic defendant (who bragged from the witness stand about his history of robberies and other crimes, and who threatened to kill his accomplice for testifying against him), that counsel adequately investigated issues of mental illness, and that a more complete mental health analysis may have backfired. The court also ruled that Pinholster was not prejudiced, stating that the post-conviction evidence would not have substantially aided the trial mitigation, and that, as a matter of law, the cases of *Terry Williams v. Taylor*, 529 U.S. 362 (2000), and *Rompilla v. Beard*, 545 U.S. 374 (2005), do not shed light on the question of prejudice, because the court in neither case considered prejudice through the "doubly deferential" lens of *Strickland* and AEDPA. A proper critique of *Pinholster* is beyond the scope of this newsletter, but the reader is referred to Justice Sotomayor's elucidating dissent, and, in particular, her description of the many factual liberties taken by the majority.

Felkner v. Jackson, 131 S. Ct. 1305 (2011). A unanimous Supreme Court summarily reversed the Ninth Circuit's grant of habeas relief on a *Batson* claim in this non-capital case from California. The court chided the Ninth Circuit for granting relief in a three-paragraph unpublished opinion, and without grappling with the contrary reasoning of the California Court of Appeals, the trial court, or even the federal district court. The Supreme Court rejected the Ninth Circuit's unadorned statement that "two out of three prospective African-American jurors were stricken, and the record reflected different treatment of comparably situated jurors." The court observed that trial court determinations on *Batson* rulings are reviewed with "great deference," and even more so on federal habeas review. Although the per curiam opinion provides little reasoning, its recitation of the state appellate court's reasoning suggests an acceptance of that decision. In particular, the court of appeals rejected Jackson's arguments on comparative juror analysis. One of those arguments concerned stricken minority Juror S, who said he was frequently stopped by police officers because of his race and age. A non-stricken juror said he had been stopped in Illinois during a "scam" by police to target cars with California license plates. The state court ruled that the latter juror's experience is "not comparable" to the former's "14 years of perceived harassment by law enforcement based in part on race."

Skinner v. Switzer, 131 S. Ct. 1289 (2011). The Supreme Court ruled, 6-3, that Texas death row prisoner Hank Skinner may pursue a civil rights claim under 42 U.S.C. § 1983, targeting the district attorney's continuing refusal to release biological evidence for DNA testing. The court rejected the State's argument that the claim was barred by *Heck v. Humphrey*, which forbids 1983 suits when a plaintiff's victory would undo a criminal conviction. A favorable ruling, the Court wrote, would only allow Skinner to do a DNA test, and would not necessarily invalidate his conviction. The court thereby rejected the broader argument that habeas corpus must be the sole remedy for a claim like Skinner's – a claim that is unavailable to Skinner on a "second or successive" petition. The court also observed that Skinner faces a difficult road ahead on the merits of his claim. Under *District Attorney's Office for Third Judicial District v. Osborne*, 129 S. Ct. 2308 (2009), Skinner does not have a viable claim under substantive due process, and he has only a limited claim that the Texas DNA statute deprives him of procedural due process.

Wall v. Kholi, 131 S. Ct. 1278 (2011). In this non-capital habeas case from Rhode Island, the Supreme Court held that a

state court motion to reduce a sentence qualifies as "collateral review" under AEDPA's tolling provisions, 28 U.S.C. § 2244(d)(2). Therefore, the prisoner was entitled to tolling of the one-year limitation period while his motion to reduce sentence was pending. The court reasoned that a motion to reduce sentence – an available remedy in Rhode Island and many other states – is "collateral" in the sense that it is not part of direct review, and it is "review" in the sense that the movant asks a court to reconsider the sentence originally imposed based on objective factors such as the severity of the crime and various characteristics of the defendant. The court held more broadly that the phrase "collateral review" in section 2244(d)(2) means "a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process."

Connick v. Thompson, 131 S. Ct. 1350 (2011). By a vote of 5-4, the Supreme Court vacated a jury award of $14 million to former Louisiana death row inmate John Thompson. Mr. Thompson was tried and convicted of attempted armed robbery shortly before his murder trial. The prosecution suppressed evidence that clothing from one of the robbery victims was stained with blood, which was later tested and conclusively shown not to be from Thompson (who has type O blood, as opposed to the type A blood found on the sample). As a result of the robbery conviction, Thompson decided not to testify in his murder trial, based on the prosecution's expanded ability to impeach him. An investigator found the blood report only weeks before Thompson's scheduled execution, the robbery and murder convictions were vacated, and a second jury acquitted Thompson of murder. Despite the State's concession of a *Brady* error, the Supreme Court ruled that Thompson could not sue the Orleans Parish District Attorney's Office under 42 U.S.C. § 1983. Because a city is not vicariously liable for its employees' unconstitutional actions, a plaintiff must show that the city's "policy" or "custom" gave rise to the violation. The court ruled that a single *Brady* violation is insufficient to create an obligation of the prosecutor's office to train its personnel, and therefore, Connick could not show that the office was "deliberately indifferent" to the wrong he suffered. The reader should review Justice Ginsburg's dissent, which details a series of *Brady* violations committed by the same office, as well as additional *Brady* violations at Thompson's first murder trial. These additional violations did not persuade the majority, because Thompson did not show a pattern of *Brady* violations that specifically involved suppressed *forensic* evidence.

CERT GRANTED

Maples v. Thomas, No. 10-63. The court granted certiorari on the following question: "Whether the Eleventh Circuit properly held that there was no 'cause' to excuse any procedural default where petitioner was blameless for the default, the State's own conduct contributed to the default, and petitioner's attorneys of record were no longer functioning as his agents at the time of any default." In Maples' case, he missed a state court filing deadline because of circumstances beyond his control. New York lawyers who were representing Maples *pro bono* left their lawfirm, and, as a result, when the state court sent its adverse ruling to the previous firm, the mailing was returned to the court unopened. Maples himself did not know of the ruling or the fact that his attorneys had changed firms. By the time he found out about the problem, the time for appealing the adverse post-conviction ruling had expired, which ultimately resulted in the default of the relevant claims on federal habeas review. Following the cert grant in *Maples*, the Supreme Court stayed the scheduled executions of Texas prisoner Cleve Foster and Arizona prisoner Daniel Cook. Foster seeks rehearing of the court's denial of cert in his case, which involves highly exculpatory blood spatter evidence discovered only after competent counsel were representing him, but long after post-conviction remedies were lost through predecessor counsel's scant efforts. Cook's case presents similar circumstances: post-conviction counsel failed to present evidence that Cook suffered extreme physical and sexual abuse as a child, including graphic accounts of rape and forced incest.

Greene v. Fisher, No. 10-637. In this non-capital habeas case from Pennsylvania, the court granted certiorari to consider the following question: "What is the temporal cutoff for when decisions from this Court count as 'clearly established Federal law'? Specifically, is a decision that this court handed down before a state prisoner's conviction became final but after his last state-court adjudication on the merits 'clearly established Federal law' [under 28 U.S.C. § 2254(d)(1)]?"

EIGHTH CIRCUIT DECISIONS

United States v. Montgomery, 635 F.3d 1074 (8th Cir. 2011). The Eighth Circuit affirmed the conviction and death sentence of Lisa Montgomery, who was convicted of an interstate kidnapping resulting in death. According to the trial evidence, Ms. Montgomery traveled from Kansas to Missouri, strangled a eight-months' pregnant woman with whom she had an online acquaintance, removed the baby from the victim's uterus with a butcher knife, then feigned that she had given birth to the child herself. The court first rejected a claim that the facts did not show a kidnapping of any "person" such that the kidnapping "resulted" in the death of a person. It reasoned that it was irrelevant whether the child was a "person" before she was removed, because she was carried away to Kansas after her birth. The court also ruled that the murder of the victim "resulted" from the kidnapping even though the child wasn't carried away until after the mother's death. The conduct underlying the kidnapping and the murder were inextricably tied together, the court reasoned, and the death

"resulted" from a kidnapping in the same way that a death "results" from a crime in the felony-murder context. The Eighth Circuit also upheld the district court's exclusion of PET and MRI imaging which, according to defense experts, was "consistent with" the defense theory that Montgomery suffered from pseudocyesis, or the false belief that she was pregnant – and also evidence that the PET scan showed brain abnormalities in the areas regulating emotional processing and core functions. The Eighth Circuit upheld the exclusion of the evidence from both phases, at various points holding that some of the evidence was excludable under *Daubert*, that its exclusion was harmless as to Montgomery's insanity defense, or that it was harmless during the penalty phase in light of other mental health evidence heard by the jury. Among other issues, the court also rejected a claim of prosecutorial misconduct, holding that it was harmless error for the prosecutor to criticize the defendant for exercising her constitutional right to call her children as mitigation witnesses ("And then after all of that she drags those kids into court here to testify in this high profile case in front of all of these people and puts them through this again and victimizes them again in front of the whole world.").

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Abu-Jamal v. Secretary, Pennsylvania Dept. of Corrections, — F.3d —, No. 01-9014, 2011 WL 1549231 (3rd Cir. Apr. 26, 2011). In this celebrated capital habeas case, the Third Circuit stood by its grant of relief on Abu-Jamal's claim under *Mills v. Maryland*, 486 U.S. 367 (1988). The Supreme Court earlier vacated the Third Circuit's decision and remanded for further consideration in light of *Smith v. Spisak*, 130 S. Ct. 676 (2010). On remand, the Third Circuit concluded that *Spisak* did not change the appropriateness of habeas relief, and adhered to its finding of a "substantial possibility" that Abu-Jamal's jurors believed they could not act upon any mitigating evidence unless all jurors unanimously believed that evidence. Unlike the circumstances of *Spisak*, the court noted that the verdict form at Abu-Jamal's trial required the jurors to indicate their findings of aggravating and mitigating circumstances at the same time and on the same form, and there is a "substantial probability" that the jurors understood the word "unanimously" to describe both kinds of circumstances.

Kindler v. Horn, — F.3d —, Nos. 03-9010, 03-9011, 2011 WL 1602083 (3rd Cir. April 29, 2011). In another capital habeas victory from the Third Circuit, the court ruled that Pennsylvania's fugitive forfeiture rule was not an "adequate and independent" ground so as to provide the basis for a default of Kinder's claims. An earlier opinion to that effect was vacated and remanded by the Supreme Court. *See Beard v. Kindler*, 130 S. Ct. 612 (2009), which held that the discretionary nature of a state procedural rule does not necessarily make the rule "inadequate." The Third Circuit observed that the Pennsylvania rule wasn't clearly established at the time Kindler violated it, and that the state court in Kindler's case applied the rule in a way that was suddenly and sharply skewed in the state's favor.

In re Turner, 637 F.3d 1200 (11th Cir. 2011). In this Florida capital case, the Eleventh Circuit denied the prisoner authorization to file a "second or successive" habeas petition in order to assert a claim of mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* came down only six days before the prisoner's federal habeas petition was denied in a 291-page order. At the time, the district court, and later, the Eleventh Circuit, declined to consider an *Atkins* claim as unexhausted. Turner thereafter brought his claim in state court, which denied relief without a hearing. The Eleventh Circuit acknowledged that Turner satisfied the literal language of 28 U.S.C. § 2244(b)(3)(A), which provides that "the . . . claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Nevertheless, relying on *In re Holladay*, 331 F.3d 1169 (11th Cir. 2003), the court ruled that Turner had to demonstrate a "reasonable likelihood of mental retardation" in order to proceed further. Turner was unable to make this showing, the court ruled. Notwithstanding an IQ score of 72 from elementary school records, Florida law creates a cutoff of 70, and, in addition, testing during post-conviction review showed scores of 98 and 108. The court also reasoned that Turner did not show deficits in adaptive behavior, in light of facts such as his graduation from high school, his attendance at junior college, his stable job history, and his ownership and care for a home.

Showers v. Beard, 635 F.3d 625 (3rd Cir. 2011). The Third Circuit upheld the district court's grant of relief in this non-capital case from Pennsylvania. The defendant was convicted and sentenced to life for murdering her husband, who consumed a fatal amount of morphine. At trial, defense counsel theorized that the husband committed suicide, while the State theorized that Showers administered the morphine without her husband's knowledge. A crucial issue, then, was whether the husband could have *unknowingly* swallowed such a large amount of morphine, perhaps with a masking agent to hide the bitter taste. Defense counsel's expert could not offer an opinion on this form of morphine; he recommended three experts for counsel to consult, but counsel didn't contact any of them. On later post-conviction review, a qualified forensic pathologist finally testified that such a large amount of morphine could not have been surreptitiously administered. The Third Circuit held that trial counsel was prejudicially ineffective for not investigating and presenting additional expert testimony, and also that appellate counsel was ineffective for not preserving the same issue under Pennsylvania's unique procedures for litigating IAC claims on direct appeal.

Adamson v. Cathel, 633 F.3d 248 (3rd Cir. 2011). The Third Circuit granted habeas relief in this New Jersey robbery case. At trial, the prosecution presented the out-of-court confessions of the defendant's alleged conspirators, but without having the jury instructed that the confessions were admissible only to impeach Adamson's testimony and not as substantive evidence. That ruling violated the holdings of *Bruton v. United States*, 391 U.S. 123 (1968), and *Tennessee v. Street*, 471 U.S. 409 (1985). Moreover, the state appellate court unreasonably applied *Street* by ruling that a jury instruction wasn't necessary, and by pointing out that the prosecutor argued the impeaching nature of the out-of-court confessions. The importance of an express instruction was "essential to the holding in *Street*," the Third Circuit reasoned. The court went on to hold that Adamson was prejudiced by the error.

Scott v. Hubert, 635 F.3d 659 (5th Cir. 2011). In this habeas case involving a burglary conviction, the Fifth Circuit reversed the district court's ruling that Scott's petition was untimely. In Scott's direct appeal, the state court affirmed his conviction but remanded for resentencing. The Fifth Circuit ruled that Scott's conviction did not become "final," for purposes of AEDPA's statute of limitation, until both the conviction *and* the sentence had undergone "the conclusion of direct review or the expiration of the time for seeking such review."

Dillon v. Conway, — F.3d —, No. 08-4030-PR, 2011 WL 1548955 (2nd Cir. Apr. 26, 2011). In this non-capital habeas case, the court held that extraordinary circumstances justified equitable tolling, so as to make timely the prisoner's otherwise one-day-late filing. The court observed that the prisoner and his wife steadfastly urged counsel to not to delay the filing until the due date, that counsel agreed to that plan but breached his promise to follow it, and that counsel filed the petition on the date that he erroneously thought it was due.

Hearn v. Ryan, No. CV 08-448-PHX-MHM, 2011 WL 1526912 (D. Ariz. Apr. 21, 2011) (unpublished). On the state's motion for reconsideration, the district court disagreed with the state's argument that a hearing on the prisoner's *Faretta* claim was barred by the Supreme Court's recent opinion in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). The court explained that it had already definitively ruled that the state court unreasonably applied *Faretta* in rejecting Hearn's claim. A hearing was required in order for the federal court itself to resolve the claim on its merits, without further deference to the state court's ruling. Therefore, the grant of a hearing was not implicated by *Pinholster*'s holding that the reasonability of a state court's ruling under 28 U.S.C. § 2254(d)(1) depends on the evidence in the state court record at the time.

MISSOURI SUPREME COURT DECISIONS

State v. Bowman, — S.W.3d —, No. SC90618 (Mo. Apr. 12, 2011). The Missouri Supreme Court upheld the first degree murder conviction of Gregory Bowman on direct appeal, but reversed his death sentence, in this St. Louis County case involving a 1977 rape and murder. Bowman's *Alford* pleas to two Illinois murders were vacated in 2001, and he was released on bail six years later. Some three days after his release, he was arrested for the Missouri murder after Illinois police forwarded his DNA profile to St. Louis County. The key evidence in the case was testimony that Bowman's profile matched that of sperm from the victim's underwear. In affirming the conviction, the Missouri Supreme Court ruled the evidence sufficient for conviction and rejected a number of evidentiary and other claims. Nevertheless, it reversed the death sentence because two of the aggravating factors were that Bowman committed the Illinois murders as to which his convictions had been vacated. The court unanimously ruled that it was improper for the jury to base its sentence on vacated convictions. It rejected the State's argument that the murders were simply "unadjudicated prior bad acts," because the jury was misleadingly informed that Bowman had been "convicted" of the two killings. Relying on *Johnson v. Mississippi*, 486 U.S. 578 (1988), and *State v. McFadden*, 216 S.W. 3d 673 (Mo. 2007), the court vacated the death sentence and remanded for a penalty phase retrial. Dissenting in part, Judge Wolff, joined by Judge Stith, argued that the court should simply resentence Bowman to life because the relatively weak evidence supporting the conviction makes a death sentence disproportionate under Mo. Rev. Stat. § 565.035.3. Judge Wolff pointed out (a) law enforcement's possible vendetta against Bowman after his Illinois release and its possible pursuit of a conviction that was "too good to be true," (b) serious chain-of-custody problems with the DNA evidence (including the fact that the supposedly "sealed" evidence locker had been flooded in the thirty years since the murder and that some of the DNA evidence had gone missing), (c) persuasive evidence pointing to another suspect in the murder, and (d) a troubling eyewitness identification performed three decades after the fact.

State ex rel. Koster v. McElwain, — S.W.3d —, No. WD73211, 2011 WL 1119756 (Mo. App. W.D. Mar. 29, 2011). The Missouri Court of Appeals upheld the circuit court's grant of habeas corpus relief to Dale Helmig, who was convicted in Gasconade County of the first-degree murder of his mother. The court agreed that the prosecution violated *Brady* by not discovering and disclosing that Mrs. Helmig had repeatedly called the police out of fear that her estranged husband – an alternative suspect – would injure or kill her, as well as evidence that Mrs. Helmig was so fearful of her husband that she obtained a gun. Helmig established "cause" for not asserting the claim in Rule 29.15 proceedings, the

court ruled. Even though Helmig had earlier presented a Rule 29.15 claim that trial counsel was ineffective for not discovering the same evidence, that claim failed because evidence of the couple's tumultuous relationship, standing alone, would not have been admissible at trial without other evidence pointing to the husband as a viable suspect. Such additional evidence became available on habeas review. The victims' purse had been found in a farm field after floodwaters receded, and the State theorized at trial that Mr. Helmig threw his mother's purse into a river at the same time that he threw her body into the river. Later investigation revealed that a canceled check found in the purse could not have been processed until days *after* Mrs. Helmig's death, which also supports a theory that her husband had a financial motive for killing her, gained access to her mail and banking records, and stood to inherit her money despite the couple's planned divorce. The court therefore ruled that Helmig wouldn't have had enough evidence to raise a viable *Brady* claim under Rule 29.15. It also granted relief on the merits, observing that the totality of circumstantial evidence casts at least as much suspicion on Mrs. Helmig's husband as on her son.

The court alternatively upheld the grant of relief on a claim that Mr. Helmig's jury was provided, and considered, a map of the area where the crime was alleged to have occurred. The map was not admitted into evidence, and it was also probably inaccurate in its portrayal of the waterways in the area around where the victim's body was dumped during a period of severe flooding in 1993. Among other interesting rulings, the court observed that it was not bound by the Eighth Circuit's rejection of the same claim on federal habeas review. *See Helmig v. Kemna*, 461 F.3d 960 (8th Cir. 2006). The Eighth Circuit ruled that it was Helmig's burden to show that he was prejudiced by the error, and that he hadn't done so. The Court of Appeals, in contrast, observed that no such burden exists on state habeas review, and that the State hadn't demonstrated that the error was harmless. The court also held that Helmig had "cause" for not raising the claim under Rule 29.15. The map incident was discovered by happenstance, and Helmig had no reason to suspect that the jurors had considered extraneous material.

Gerlt v. State, — S.W.3d —, No. WD72225, 2011 WL 1363898 (Mo. App. W.D. Apr. 12, 2011). The Court of Appeals made two procedurally significant rulings in the course of denying relief in this post-conviction case brought under Rule 24.035, in which the defendant pleaded guilty to driving while revoked and was sentenced as a persistent offender. First, the court held that the time limit under Rules 29.15 and 24.035 is not jurisdictional, and that the state waives the timeliness issue if it fails to raise it below. The court followed its own precedent on this issue, and it recognized a split of authority with decisions from the Southern and Eastern Courts of Appeal. *See Swofford v. State*, 323 S.W.3d 60, 64 (Mo. App. E.D. 2010); *Dorris v. State*, — S.W.3d —, No. SD30491, 2011 WL 742548 (Mo. App. S.D. Mar. 1, 2011). [Editor's note: On April 26, 2011, the Missouri Supreme Court granted transfer in *Dorris*, effectively vacating the Southern District's opinion]. Second, the court ruled that a post-conviction movant waives a circuit court's failure to enter findings of fact and conclusions of law, unless the movant files a motion to amend the judgment under Rule 78.07(c). In this case, the circuit court issued findings and conclusions on Gerlt's initial motion but not his amended motion. The Court of Appeals affirmed as to the claim in the initial motion but ruled that Gerlt preserved nothing for review from his amended motion. The *Gerlt* opinion appears to be the first Missouri case squarely addressing the issue. *See Hollingshead v. State*, 324 S.W.3d 779, 782 (Mo. App. W.D. 2010) (reserving the question).

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

Green v. State, — S.W.3d —, No. CR 10-511, 2011 WL 729630 (Ark. Mar. 3, 2011). In this capital interlocutory appeal, the Arkansas Supreme Court affirmed the trial court's denial of the defendant's motion to dismiss. The court held that a retrial would not amount to double jeopardy even though the State committed a *Brady* violation prior to Billy Green's second trial, by not disclosing that the State's star witness – Green's son – gave a prior statement admitting to the murder and stating that his father wasn't involved. At Mr. Green's first trial, the State committed reversible error by presenting improper "bad acts" evidence. Juries imposed the death penalty after both trials. Mr. Green will now be subject to a third trial despite the State's repeated misconduct. In ruling as it did, the court relied on *Oregon v. Kennedy*, 456 U.S. 667 (1982), under which double jeopardy precludes a retrial only when the prosecutor intentionally provokes a mistrial through misconduct. The court declined to create a broader rule under the state constitution, rejecting the lead of state courts in Pennsylvania, Hawaii, New Mexico, Arizona, and Oregon, and following the course taken by the supreme courts of Missouri and Kansas. Nevertheless, the court referred the case to the Committee on Professional Conduct for possible disciplinary action.

Isom v. State, No. CR 02-213, 2011 Ark. 149, 2011 WL 1319633 (Ark. Apr. 7, 2011) (unpublished). Arkansas death row prisoner Kenneth Isom moved to recall the mandate on his direct appeal, pointing to numerous "defects or breakdowns in the appellate process," including ineffective assistance of appellate counsel. In an unpublished ruling, the Arkansas Supreme Court rejected the State's four-page response to the motion, which itself contained only one page addressing the merits of Mr. Isom's claims. Observing that the death penalty "is a unique punishment that demands unique attention to procedural safeguards," the court directed

the state to "file a response specifically addressing each of Isom's claims for recalling the mandate.'

Perkins v. Hall, — S.E.2d —, No. S10A1754, 2011 WL 976618 (Ga. Mar. 18, 2011). The Georgia Supreme Court held that trial counsel performed ineffectively by not adequately investigating and developing evidence of the defendant's brain damage resulting from a head injury in which the tines of a rake pierced through the defendant's skull. Even though the defendant refused to undergo a mental health evaluation, counsel did not adequately interview the defendant's family and friends in order to ask about changes in his behavior after suffering the brain injury. Perkins told counsel that he didn't want to be portrayed as "crazy," but the court noted that the 1989 ABA Guidelines require counsel to *investigate* "regardless of any initial assertion by the client that mitigation is not to be offered." Lay witnesses could have testified that that Perkins "suffered from severe personality and cognitive changes" after the injury, including ringing in his ears, blackout, difficulties with memory, "zoning out," and suicidal behavior. Although the court vacated Perkins' death sentence, it went on to hold that he procedurally defaulted on his claim that he was incompetent to stand trial. Two judges dissented from the latter holding, reasoning that such a claim shouldn't be waivable, or that, alternatively, the default should be subject to a "miscarriage of justice" exception as Georgia courts have done with claims of mental retardation.

Bryant v. State, — S.E.2d —, No. S10P1689, 2011 WL 977871 (Ga. Mar. 18, 2011). On direct appeal in this double homicide case, the Georgia Supreme Court reversed the defendant's death sentence due to the admission of improper and excessive victim impact evidence. Specifically, the victims' families were allowed to characterize the crime as well as the defendant, rather than to explain the impact of the crime. One of the witnesses, for example, testified that the victims were "shot and left in a patch of kudzu as if they were a piece of trash on the side of the road," while another testified that the defendant "had many chances" while her sister "never had a chance" because the defendant "ensured on purpose, on purpose, that she will not ever be given that chance." Relying on its earlier precedent, the court observed that *Payne v. Tennessee*, 501 U.S. 808 (1991), left intact the holding of *Booth v. Maryland*, 482 U.S. 496 (1987), that the state is not permitted to present testimony concerning "a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence."

Commonwealth ex rel. Conway v. Shepherd, — S.W.3d —, No. 2010-SC-00586-OA, 2011 WL 1106730 (Ky. Apr. 5, 2011). The Kentucky Supreme Court denied the state's challenge to a lower court's grant of injunctive relief as to the state's execution protocol. In a previous case, the Supreme Court ruled that the protocol was subject to the rulemaking provisions of the state's administrative procedure act. In the present litigation, the Circuit Court of Franklin County enjoined a prisoner's execution on the grounds that the regulation promulgated by Department of Corrections conflicts with the state's lethal injection statute and does not adequately ensure against the execution of incompetent or mentally retarded prisoners. The Supreme Court ruled that the trial court did not abuse its discretion, and that the State could pursue its arguments, if necessary, in the ordinary course of an appeal from any adverse final judgment.

Ex Parte Scott, — So.3d —, No. 1091275, 2011 WL 925761 (Ala. Mar. 18, 2011). In this capital post-conviction case from Alabama, the state supreme court reversed the denial of relief and remanded for further proceedings, observing that the trial court's order was a verbatim duplicate of the State's answer to Scott's post-conviction pleading. The court was particularly troubled that the order recounted the same typographical and spelling errors as the answer, and also that it was identical in length at 58 pages. To make matters worse, the order was a duplicate of a purposefully and avowedly partisan document – an answer – rather than even the adoption of a party's proposed order. Under these circumstances, the Alabama Supreme Court ruled that the trial court's order did not reflect "independent and impartial findings and conclusions," and it remanded for further proceedings.

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