THE DEATH PENALTY LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE

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NOTEWORTHY NEWS

MISSOURI'S PRISON-MURDER PROBLEM

On August 2, 2011, the Missouri Supreme Court granted relief on a *Brady* claim to former death row inmate Reginald Griffin. *See State ex rel. Griffin v. Denney*, — S.W.3d —, No. SC91112, 2011 WL 3298956 (Mo. Aug. 2, 2011). Griffin was convicted and sentenced to death in 1987 for a murder at the Missouri Training Center for Men in Moberly, and the prosecution withheld evidence that guards seized a sharpened screwdriver from an inmate who attempted to leave the area immediately after the stabbing. Griffin's case powerfully demonstrates that Missouri's death penalty system is broken. For one thing, Griffin was sentenced to death based, in part, on the jury's consideration of previous crimes committed by a *different* individual named Reginald Griffin. That fact led the Missouri Supreme Court to vacate the death sentence, and Griffin was later sentenced to life. *See State v. Griffin*, 848 S.W.2d 464, 471 (Mo. 1993). For another, Griffin is the fourth Missourian to be sentenced to death for a prison murder, and to get relief on powerful evidence that he is innocent. Joseph Amrine spent seventeen years on Missouri's death row for a murder he did not commit, and obtained relief after the Missouri Supreme Court found "clear and convincing" evidence of his innocence, and the prosecution declined to re-charge him. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003). Eric Clemmons spent ten years on Missouri's death row before winning federal habeas relief on a *Brady* claim, after which a jury acquitted him. *See Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997). And perhaps most notably, Lloyd Schlup spent 14 years on Missouri's death row, obtaining pre-AEDPA relief on a successive IAC claim. Relief was granted only after it was determined that "a constitutional violation has probably resulted in the conviction of one who is actually innocent." *See Schlup v. Delo*, 513 U.S. 298 (1995); *Schlup v. Delo*, 912 F. Supp. 448 (E.D. Mo. 1995); *Schlup v. Bowersox*, No. 4:92CV443 JCH, 1996 WL 1570463 (E.D. Mo. May 2, 1996). The prosecution pursued the death penalty at Schlup's retrial. On the second day of trial, Schlup accepted a guilty plea to second-degree murder in return for a sentence that left intact his parole-eligibility date on other offenses.

STAYS OF EXECUTION IN NEBRASKA, ARKANSAS

On May 25, the Nebraska Supreme Court stayed the execution of Carey Dean Moore, which was scheduled for June 14. Moore challenged, among other things, the state's obtaining and planned use of thiopental from a company in India. The grant of a stay signifies that Moore's claims are cognizable on a successive petition for post-conviction relief. Later news stories reported that the DEA advised Nebraska's Department of Correctional Services that its importation of thiopental was illegal under the Controlled Substances Act and that the imported drug could not be used in executions. The Nebraska Attorney General's Office nevertheless pressed the Nebraska Supreme Court to deny Moore's motion for stay and then to lift the stay after it was granted. All the while, the state did not disclose the fact that it had been admonished by the DEA, or more fundamentally, that it lacked any sodium thiopental with which to legally carry out the very execution that it was urging. Based on these developments, Moore has been granted leave to file a supplemental claim that the state violated his Eighth Amendment rights by placing him in false apprehension of being executed. [Editor's note: Amnesty International details the recent events in Moore's case in its report, "USA An Embarrassment of Hitches: Reflections on the Death Penalty, 35 Years after *Gregg v. Georgia*, as States Scramble for Lethal Injection Drugs," at 40-41 (July 2011). The report is available at www.amnesty.org.]

On June 23, the Arkansas Supreme Court stayed the scheduled executions of Marcel Williams, Jason McGehee, and Bruce Ward, based on the continuing pendency of litigation in the Pulaski County Circuit Court, challenging the state's "Method of Execution Act." The court has stayed other executions based on the same litigation, but Governor Mike Beebe set the additional dates at the Attorney General's request.

THE TERM AHEAD

The Supreme Court will address a number of important and recurring issues in habeas law. These include (a) whether a prisoner is entitled to effective counsel when litigating a first

IN THIS ISSUE

challenge to trial counsel's effectiveness, (b) the point at which the statute of limitation begins to run after affirmance on direct appeal by an intermediate state court, (c) the circumstances (if any) under which a death-sentenced habeas petitioner may fire court-appointed counsel, and *perhaps*, (d) whether a mentally incompetent death-sentenced petitioner is entitled to stay the habeas proceedings until his or her competence is restored. *See* "Cert Granted" and "Other Supreme Court Actions," below.

RING RELIEF DENIED TO TAYLOR AND NUNLEY; NO RETROACTIVE PROPORTIONALITY REVIEW

The Missouri Supreme Court, by identical votes of 4-3, refused penalty phase relief to Michael Taylor and Roderick Nunley, who were convicted of murder and rape in Jackson County. *See State ex rel. Taylor v. Steele*, 341 S.W.3d 634 (Mo. 2011); *State v. Nunley*, 341 S.W.3d 611 (Mo. 2011). In both cases, the majority reasoned that the men validly waived the federal constitutional right to have jurors determine the facts necessary for their death sentences, even though no such right existed when Taylor and Nunley pled guilty – long before the issuance of *Ring v. Arizona*, 536 U.S. 584 (2002). The court also held, unanimously, that its recent cases expanding proportionality review do not apply to defendants whose sentences were reviewed under the since-discredited approach under which the court limited its comparison of the case at hand to previous cases in which death was imposed. *See State v. Dorsey*, 318 S.W.3d 648, 659 (Mo. 2010), and cases cited. On the *Ring* issue, both cases both feature spirited dissents from Judge Stith, joined by Judges Teitelman and Wolff.

LETHAL INJECTION DEVELOPMENTS

The ever-changing area of lethal injection continues to be ever-changing.

Within the Eighth Circuit – There are no executions scheduled in Arkansas, Nebraska, Missouri, or South Dakota, but all four states are witnessing fertile challenges to execution procedures. Arkansas' death penalty remains on hold pending challenges to the state's bizarre "Method of Execution Act," and the state surrendered its supply of illegally-obtained thiopental to the DEA. On August 15, the Circuit Court of Pulaski County granted partial summary judgment to the prisoners as well as the State, holding that part of the statute is unconstitutional. Both sides plan to appeal the ruling, and it remains unclear when other executions might be scheduled. Nebraska's first lethal injection protocol is being challenged amid revelations that the state obtained its thiopental illegally, agreed to the DEA's demand not to administer the drug, and then failed to inform the Nebraska Supreme Court that it lacked the drugs to carry out the state-requested execution of Carey Dean Moore. The Missouri Supreme Court has not scheduled any executions since that of Martin Link in February. The state's supply of sodium thiopental has long since expired, and the state has not announced any changes to its legal injection method. The district court in *Ringo v. Lombardi*, No. 09-4095-CV-C-NKL (W.D. Mo.)., dismissed the prisoners' lethal injection challenge for lack of standing, despite observing that "[I]t appears that Missouri is violating federal law by failing to obtain its execution drugs with a doctor's prescription and by failing to use a doctor to administer the drugs." Meanwhile in South Dakota, a lethal injection challenge is focusing on that state's importation of thiopental from the same Indian supplier who furnished Nebraska's since-destroyed stash of the drug. Discovery is ongoing. *See Moeller v. Weber*, No. 4:04-cv-04200-LLP (D.S.D.).

Pentobarbital – An increasing number of states have substituted the barbiturate pentobarbital/Nembutal for now-unavailable sodium thiopental, even though pentobarbital has no track record as an anesthetic in lethal injection procedures or elsewhere in the field of medicine. Delaware adopted such a change and, on July 29, carried out the state's first execution in six years. Four days earlier, the Florida Supreme Court ordered an evidentiary hearing and a stay of execution, based on the "substantial risk of harm" posed by the use of pentobarbital as an anesthetic. The state took the extraordinary step of asking the U.S. Supreme Court to vacate the Florida Supreme Court's stay, but the attempt failed. *See Florida v. Valle*, — S. Ct. —, No. 11A117, 2011 WL 3209091 (U.S. Jul. 29, 2011). In Georgia, the June 23 execution of Roy Willard Blankenship went horribly awry, as the prisoner jerked his head and gasped for breath while the pentobarbital was administered. Blankenship was apparently conscious for the first three minutes of the execution, and "suffered greatly" according to Harvard Medical School anesthesiologist David Waisel. The state videotaped the execution of Andrew DeYoung about four weeks later, with fewer reported problems. Meanwhile, the Danish manufacturer of Nembutal – Lundbeck – continues to insist the drug is not safe and reliable for use in lethal injections. On July 1, Lundbeck announced steps to restrict sales of the drug to distributors who might pass it along for executions. Among other measures, Lundbeck will not sell Nembutal to prisons in states that carry out executions, and all purchasers must sign an agreement that they will not redistribute the drug without Lundbeck's approval.

A TIDE OF BIAS IN ALABAMA

Three states allow a judge to impose a death sentence even after a jury recommends a life sentence: Alabama, Florida, and Delaware. Death sentences by judicial override are non-existent in Delaware and have not been seen in Florida since 1999. In Alabama, however, there are forty prisoners on death row as a result of judicial overrides. The Equal Justice Initiative studied these cases and reached two troubling

conclusions. First, judicial overrides occur more frequently during judicial election years, and trial court judges throughout the state are elected and often run on "tough on crime" platforms. Second, the system is racially biased; approximately 75 percent of overrides involve white victims, even though only 35 percent of homicide victims in Alabama are white.

THE NOT-SO-GOLDEN STATE

A recent study of California's death penalty system has produced some dizzying numbers. The state's taxpayers have spent more than $4 billion on the system since 1978. That same system has yielded 13 executions, which amounts to a staggering $308 million per execution. Every year, the state spends $184 million on capital cases above and beyond what it would spend if the cases were non-capital. And even the least expensive death penalty trial costs over $1 million more than the most expensive trial in which the state seeks life without parole. These and other findings are detailed in a forthcoming article by Ninth Circuit Judge Arthur L. Alarcon and Professor Paula M. Mitchell, *Executing the Will of the Voters: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loyola of Los Angeles Law Review S41 (2011).

THE 10 MILLION DOLLAR MAN

Federal prosecutors in New York failed in their attempt to secure the death penalty against mobster Vincent Basciano, as a unanimous jury in Brooklyn sentenced the defendant to life imprisonment. Among other circumstances, the jury relied on a mitigator that other mobsters who "have admitted to an equal or greater number of serious crimes . . . are not facing the death penalty." Jurors also rejected the government's argument that Mr. Basciano would continue his mob operation behind bars. All told, it is expected that the case has cost taxpayers approximately $10 million.

MESSING WITH TEXAS

A recent law review article seeks to explain a stark decline in Texas death sentences. *See* David McCord, *What's Messing with Texas Death Sentences?*, 43 Tex. Tech L. Rev. 601 (2011). From the period of 1992-96 to the period of 2005-09, new death sentences plunged from an average of 42 per year to 14 per year, or a 70 percent decline. Professor David McCord advances a number of explanations, including the 2005 advent of life without parole sentences in lieu of "Hard 40" sentences. But two particular factors stand out: first, death sentences have all but evaporated from the state's less populous counties, likely because "they simply cannot afford to mount death penalty prosecutions." Second, death sentences have dramatically plunged in Houston (Harris County), from 13.2 per year to 2.4 per year. Formerly the death penalty capital of the country, Harris County witnessed the retirement of long-time District Attorney Johnny Holmes, a scandal in the local crime lab, and the recent emergence of a well-trained capital defense bar.

R.I.P. PROFESSOR BALDUS

The capital defense community will dearly miss David C. Baldus, a legal scholar and social scientist whose pioneering work gave rise to the failed litigation in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Faced with Professor Baldus's rigorous multiple regression analysis – and his showing that Georgia murder defendants who killed white victims were 4.3 times more likely to receive the death penalty than those who killed black victims – a bare 5-4 majority of the Supreme Court denied relief. Under *McCleskey*, a defendant must show that the individuals involved in his particular case acted with racial bias; mere systemic bias does not suffice. Writing for the majority, Justice Powell reasoned that Baldus's claims might call the entire criminal justice system into question if courts took them too seriously: "[I]f we accepted McCleskey's claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty. Moreover, the claim that his sentence rests on the irrelevant factor of race easily could be extended to apply to claims based on unexplained discrepancies that correlate to membership in other minority groups, and even to gender." *Id.* at 315-17. Justice Brennan's dissent called out the majority's abdication for what it was: "Taken on its face, such a statement seems to suggest a fear of too much justice. Yet surely the majority would acknowledge that if striking evidence indicated that other minority groups, or women, or even persons with blond hair, were disproportionately sentenced to death, such a state of affairs would be repugnant to deeply rooted conceptions of fairness. The prospect that there may be more widespread abuse than McCleskey documents may be dismaying, but it does not justify complete abdication of our judicial role. The Constitution was framed fundamentally as a bulwark against governmental power, and preventing the arbitrary administration of punishment is a basic ideal of any society that purports to be governed by the rule of law." *Id.* at 339 (Brennan, J., dissenting). After retiring from the court, Justice Powell admitted that *McCleskey* was the decision he most regretted.

U.S. SUPREME COURT RECENT DECISIONS

Bobby v. Mitts, 131 S. Ct. 1762 (2011). Reversing the Sixth Circuit's grant of habeas relief, the court ruled that Ohio's penalty phase instructions do not violate *Beck v. Alabama*, 447 U.S. 625 (1980), just as a decision last term held that the same instructions do not violate *Mills v. Maryland*, 486 U.S. 367 (1988). *See Smith v. Spisak*, 130 S. Ct. 676 (2010). The instructions tell jurors that they must determine whether the

aggravators outweigh the mitigators beyond a reasonable doubt, and if so, that they must recommend a sentence of death, but if not, the jury must decide which of two possible life sentences to recommend. The Supreme Court ruled that these instructions do not implicate the concern of *Beck*, which is that a jury, when forced to choose between a conviction on a capital offense and an acquittal, might resolve all doubts in favor of conviction (and thus, a lesser-included offense must be instructed if the evidence warrants it). *Beck* was concerned about unwarranted convictions, and the court found no reason to believe that the jurors in Mitts' case would have been influenced by a fear that a non-death sentence would have resulted in the defendant walking free.

Leal v. Texas, 131 S. Ct. 2866 (2011). A sharply divided Supreme Court refused to stay the execution of Mexican citizen Humberto Leal Garcia, who was not notified of his right to consular assistance under the Vienna Convention on Consular Relations. In *Medellín v. Texas*, 552 U.S. 491 (2008), the court ruled that a state's consular obligations are not domestically enforceable in court. *Medellín* relied, in part, on the absence of any proposed legislation to make these obligations enforceable. Nevertheless, the court in *Leal* ruled that a bill proposed by Senator Patrick Leahy did not justify a stay, notwithstanding the Solicitor General's argument that Leal's execution would gravely compromise our foreign policy in Mexico and elsewhere. Leal was executed later that day, with no dispute that the United States is in breach of its obligations under international law.

Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011). The court issued another defense-friendly installment in its series of Confrontation Clause cases. In this DWI case, the prosecution relied on a forensic lab report to prove Bullcoming's blood-alcohol level from a blood sample. The analyst who performed the test and certified the report did not testify at trial. Instead, the prosecution called another analyst who had not participated in or observed the test in this case. The Supreme Court held that the Confrontation Clause forbids the prosecution from introducing the report through the in-court testimony of an analyst who did not certify, perform, or observe the test being reported.

Kentucky v. King, 131 S. Ct. 1849 (2011). By a vote of 8-1, the Supreme Court upheld a warrantless search in this "exigent circumstances" case. Officers who were pursuing a suspect knocked on an apartment door and announced "police," only to hear what sounded like people inside hurrying to destroy drug evidence. They then kicked in the door, found drugs and drug paraphernalia inside, and arrested Mr. King. The Kentucky Supreme Court ordered the evidence suppressed, ruling that police cannot rely on the "exigent circumstances" exception to the Fourth Amendment's warrant requirement when the police themselves have created the exigency, either by (i) bad-faith conduct aimed at avoiding the warrant requirement (especially when police already have enough probable cause to get a warrant), or (ii) conduct that is reasonably foreseeable to produce an exigency (such as knocking on the door and announcing "police," which might lead occupants to destroy evidence). The Supreme Court reversed, reasoning that an exigency's creation by police officers will not invalidate a search unless the officers' conduct itself violates the Fourth Amendment. The conduct here of knocking on a door and announcing "police" was not unreasonable. The court remanded for the state courts to determine whether the police had sufficient basis for inferring that the occupants of the apartment were likely to destroy evidence, i.e., whether there was an "exigency" in the first place.

Davis v. United States, 131 S. Ct. 2419 (2011). Extending the "good faith" exception of *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court ruled that evidence should not be suppressed if, at the time of the police's search, the search was lawful under appellate precedent that is later overruled. In this case, the police searched a car incident to arrest, but without a showing that the arrestee had immediate access to the car or that the car was likely to contain evidence of a crime. Such "routine" car searches were later forbidden by the court's 5-4 decision in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). Nevertheless, they were permissible in the Eleventh Circuit, where the search of Davis's car took place. The court reiterated its recent holdings that the Fourth Amendment exclusionary rule is not required by the constitution's text, and that it should be employed only when it meaningfully deters police misconduct.

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011). The Supreme Court ruled that a juvenile's age is relevant to the "custody" determination underlying *Miranda*, notwithstanding the general rule that "custody" is an objective test depending on whether a reasonable person under the circumstances would feel free to leave the interaction with police. The law in many tort and other contexts considers a person's age in determining "reasonable" conduct, and the court noted that police can generally infer a juvenile suspect's actual or approximate age. In this case, a thirteen-year-old child was removed from his classroom and interviewed by a police officer and an assistant principal before confessing to a break-in and theft. He was not told that he was free to leave and was not given a *Miranda* warning. The Supreme Court remanded the case to the state courts, for a re-determination of whether J.D.B. was in custody, considering his age as well as all other relevant circumstances.

Fowler v. United States, 131 S. Ct. 2045 (2011). A federal witness-tampering statute makes it a federal crime "to kill another person, with intent to . . . prevent the communication by any person to a [Federal] law enforcement officer . . . of information relating to the . . . possible commission of a Federal offense." 18 U.S.C. § 1512(a)(1)(C). The Supreme Court held that a conviction under the statute requires at least

a "reasonable likelihood" that the person killed would have made a relevant communication to a federal officer. In this case, Fowler and his associates were gathered in a cemetery, where they were putting on dark clothes and otherwise planning a bank robbery. A police officer accosted the group, and Fowler shot him to death. It is not clear that Fowler's shooting prevented any information from reaching a *federal* officer. Indeed, there was no federal involvement in the crime at all until one of Fowler's accomplices was considered for federal prosecution – and even then, only because the statute of limitation had expired under the relevant Florida statute. The Supreme Court remanded the case for further proceedings.

Turner v. Rogers, 131 S. Ct. 2507 (2011). The Supreme Court ruled that due process does not automatically entitle an allegedly deadbeat parent to court-appointed counsel at a contempt hearing that might result in incarceration, at least when the custodial parent is also unrepresented by counsel. Nevertheless, if the contempt-issuing court does not provide counsel to the non-custodial parent, then due process requires alternative procedures that "assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." Such safeguards include notice to the defendant that "ability to pay" is a critical element of the contempt proceeding, the use of a form to elicit relevant financial information, the defendant's opportunity to respond to statements and questions about his/her financial status, and an express finding by the court as to whether the defendant has the ability to pay the required child support.

CERT GRANTED

Martinez v. Ryan, No. 10-1001. The court granted certiorari on the following issue: "Whether a defendant in a state criminal case who is prohibited by state law from raising on direct appeal any claim of ineffective assistance of trial counsel, but who has a state-law right to raise such a claim in a first post-conviction proceeding, has a federal constitutional right to effective assistance of first post-conviction counsel specifically with respect to his ineffective-assistance-of-trial-counsel claim"

Gonzalez v. Thaler, No. 10-895. In this non-capital murder case from Texas, the issue appears to be whether AEDPA's one-year statute of limitation begins to run when a lower state appellate court issues its mandate, or instead, when the time expires for the prisoner to seek discretionary review from a higher state court. The Supreme Court nevertheless repackaged the prisoner's "questions presented," so as to grant certiorari on the following issues: "1) Was there jurisdiction to issue a certificate of appealability under 28 U.S.C. § 2253(c) and to adjudicate petitioner's appeal? (2) Was the application for a writ of habeas corpus out of time under 28 U.S.C. § 2254(d)(1) due to the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review?". The first question stems from the Fifth Circuit's issuance of a COA without addressing whether "jurists of reason would find it debatable whether the petition states a valid claim for the denial of a constitutional right" under *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Martel v. Clair, No. 10-1265. The court granted the state of California's petition in order to consider the following issue: "Whether a condemned state prisoner in federal habeas corpus proceedings is entitled to replace his court-appointed counsel with another court-appointed lawyer just because he expresses dissatisfaction and alleges that his counsel was failing to pursue potentially important evidence."

Smith v. Louisiana, No. 10-8145. In this capital case the court will consider the following two issues: "1) Whether there is a reasonable probability that the outcome of Smith's trial would have been different but for *Brady* and *Giglio/Napue* errors; 2) whether the state courts violated the Due Process Clause by rejecting Smith's *Brady* and *Giglio/Napue* claims." The case arises from Orleans Parish, which is the same jurisdiction involved in *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (rejecting exoneree's claims under 42 U.S.C. § 1983).

Perry v. New Hampshire, No. 10-8974. The court will consider the following issue in this theft case from New Hampshire: "Do the due process protections against unreliable identification evidence apply to all identifications made under suggestive circumstances or only when the suggestive circumstances were orchestrated by the police?"

Williams v. Illinois, No. 10-8505. Accepting yet another Confrontation Clause case, the court granted certiorari to consider "Whether a state rule of evidence allowing an expert witness to testify about the results of DNA testing performed by non-testifying analysts violates the Confrontation Clause, when the defendant has no opportunity to confront the actual analysts."

OTHER SUPREME COURT ACTIONS

On May 31, 2011, the Supreme Court lifted its stay of execution as to Texas inmate Cleve Foster, whose execution has been rescheduled for September 20. *See Foster v. Texas*, No. 10-8317. The order in *Foster* appears to signal a limitation of the court's willingness to consider claims of ineffective post-conviction counsel, as it is doing in *Maples v. Thomas*, No. 10-63, *Martinez v. Ryan*, No. 10-1001, and other cases. Specifically, the court appears to be limiting its

consideration to those claims in which PCR counsel was ineffective during the prisoner's *first* opportunity to present a claim of ineffective trial counsel, as opposed to an appeal of the denial of post-conviction relief.

On the same date as the *Foster* order, the court asked the Solicitor General to chime in on Arizona's cert petition challenging the rule of *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (2003). *See Ryan v. Gonzales*, No. 10-930. The state's cert petition presents the following question: "Does 18 U.S.C. § 3599(a)(2) – which provides that an indigent capital state inmate pursuing federal habeas relief 'shall be entitled to the appointment of one or more attorneys' – entitle a death row inmate to stay the federal habeas proceedings he initiated if he is not competent to assist counsel?"

EIGHTH CIRCUIT DECISIONS

In re Carlyle, 644 F.3d 694 (8th Cir. 2011). In his capacity as Chief Judge of the court, Judge William J. Riley ruled that he lacked jurisdiction to consider an appeal of a district court's limits on CJA fees awarded for executive clemency proceedings. In this case, the district court authorized a total of only $7500 for clemency efforts on behalf of Missouri death-sentenced prisoner Richard Clay. Those efforts proved successful, as Governor Nixon reduced Clay's sentence to life imprisonment. Counsel sought reimbursement for $37,876.80, but to no avail. The court reasoned that CJA determinations are administrative rather than judicial in nature, and that an appeal is not available. Of course, the court's mere lack of jurisdiction did not keep it from chiming in the merits, to minimize the injustice suffered by counsel: "Carlyle's contributions in Clay's service are important and appreciated. But it must be remembered that CJA service is first a professional responsibility, and no lawyer is entitled to full compensation for services for the public good."

Sun Bear v. United States, 644 F.3d 700 (8th Cir. 2011) (en banc). By a vote of 6-5, the en banc Eighth Circuit denied section 2255 relief in this second-degree murder case in which the defendant was erroneously sentenced as a "career offender." Sun Bear argued at trial and on direct appeal that the enhancement was wrongly applied, but the Supreme Court's later opinion in *Begay v. United States*, 553 U.S. 137 (2008), vindicated Sun Bear's argument. As a result of the erroneous enhancement, the district judge employed a guideline range of 360 months to life, rather than 292 to 365 months, and the judge sentenced Sun Bear to 360 months. The Eighth Circuit ruled that Sun Bear's claim isn't cognizable under section 2255, and that guideline-sentencing errors generally cannot be redressed unless they amount to a "miscarriage of justice." In finding no such miscarriage, the court observed that Sun Bear's 360 month sentence was beneath the statutory maximum of life imprisonment, and also within the unenhanced guideline range of 292 to 365 months – so that the district court theoretically *could* or *might* have sentenced Sun Bear to the same sentence even without the error. Judge Melloy's spirited dissent argued that Sun Bear's sentence is "inconsistent with the rudimentary demands of fair procedure," because he was punished for an enhancement that does not apply – and after fully preserving the very same issue at trial and direct appeal. "I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement. Case closed. Move on to the next. Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable judicial determination of his claim." *Id.* at *10, quoting *Gilbert v. United States*, 640 F.3d 1293, 1337 (11th Cir. 2011) (en banc) (Hill, J., dissenting).

Rues v. Denney, 643 F.3d 618 (8th Cir. 2011). The Eighth Circuit held that the prisoner's habeas petition was untimely in this non-capital Missouri case. A clerical error led habeas counsel to file the petition fourteen days late. That fact did not justify equitable tolling; the miscalculation was merely a "garden variety claim of excusable neglect." *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010). Rues alternatively argued that the petition was not actually due until one year following the National Academy of Sciences' report casting doubt on the ballistics evidence that was used to convict him. *See* 28 U.S.C. § 2254(d)(1)(D) ("the date on which the factual predicate of the claim . . . could have been discovered through due diligence"). The court rejected this argument as well. It reasoned that the NAS report was not really "new" evidence, that previous academic writings had reached some of the same conclusions, and that the trial defense itself challenged the soundness of the prosecution's evidence concerning the markings on shotgun shells.

Link v. Luebbers, No. 4:00-CV-1597 AGF, 2011 WL 2938155 (E.D. Mo. Jul. 21, 2011) (unpublished). The district court in this section 2254 case expressed doubt that the CJA permits reimbursement for federal lethal injection litigation as well as judicial challenges to the state clemency process. Nevertheless, the court authorized payment for the preparation and filing of motions to recall the mandate in the Missouri Supreme Court, which asserted claims based on that court's newly-expanded means of proportionality review, claims of IAC based on intervening precedent of the U.S. and Missouri Supreme Courts, and also a claim challenging Missouri's lethal injection protocol under state law. Citing *Harbison v. Bell*, 129 S. Ct. 1481, 1489 n.7 (2009), the court reasoned that the motions to recall the mandate are "similar to federal counsel exhausting a claim in state court in the course of federal habeas representation" and "were taken in order to stay Link's execution." The court invited counsel to present further briefing on the compensability of federal lethal injection and clemency-bias litigation, but it believed that such

efforts are new and separate causes of action rather than "subsequent proceedings" under 18 U.S.C. § 3599(e).

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

Carter v. Bradshaw 644 F.3d 329 (6th Cir. 2011). The Sixth Circuit joined the Ninth and Seventh Circuits in recognizing the right of a death-sentenced habeas petitioner to be competent during the proceedings, and to have the proceedings stayed if there are claims that reasonably require the prisoner's competent assistance. The court relied primarily upon 18 U.S.C. § 4241, which governs the competence of criminal defendants during trials, but which the Supreme Court relied upon in holding that a habeas petitioner must be competent in order to end his remedies. *See Rees v. Peyton*, 384 U.S. 312, 314 (1966). The court cited with approval, but did not adopt the precise reasoning of, the Ninth Circuit's holding in *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (2003), that the right to competence is implied by the grant of federally-funded counsel for death-sentenced petitioners. The court nevertheless agreed with *Rohan* that it would be inappropriate to appoint a "next friend," who would be in no better position than anyone else to ascertain Carter's sane recollection of events. The Sixth Circuit also ruled that the district court erred by dismissing the petition without prejudice and prospectively applying equitable tolling. The proper remedy, the court ruled, is instead to resolve any claims that do not require Carter's assistance, while staying those which might potentially benefit from Carter's input.

Hodges v. Epps, — F.3d —, No. 10-70027, 2011 WL 3211197 (5th Cir. Jul. 29, 2011). In this Mississippi capital case, the Fifth Circuit affirmed the grant of relief on a due process claim. Hodges' jury was instructed that, if it failed to reach a unanimous sentencing verdict, the judge would sentence Hodges to life *with* parole – even though Mississippi law at the time expressly forbade parole for death-eligible offenses. The court first held that the claim was not procedurally defaulted. On direct appeal, the Mississippi Supreme Court held that trial counsel did not object to the error, and it alternatively rejected the claim on the merits as harmless. Hodges re-asserted the claim on post-conviction review, and this time, the state supreme court reiterated the merits portion of its earlier ruling and held that the claim was barred by res judicata. The Fifth Circuit held that the later adjudication was "on the merits," and thus lifted the procedural bar that would otherwise apply from the direct appeal. The court also ruled that it was unreasonable for the state court to find the error harmless, considering that the prosecutor argued Hodges' future dangerousness at length and specifically noted that the judge would make Hodges parole-eligible if the jury didn't unanimously sentence him to death.

Simon v. Epps, No. 11-70015 (5th Cir. May 25, 2011) (unpublished order). The Fifth Circuit granted a stay of execution on the prisoner's claim that he was incompetent to be executed under *Ford v. Wainwright*, 477 U.S. 399 (1986), and *Panetti v. Quarterman*, 551 U.S. 930 (2007). Mr. Simon suffered a severe blow to the head some five months before his scheduled execution, and as a result, he could not accurately or rationally remember the crime for which he was condemned. Mississippi prison officials denied counsel's request for Simon to be evaluated by a defense neuropsychologist, and the state courts denied a hearing, despite affidavits from Simon's attorneys, a caseworker's account of Simon's difficulties, and prison medical records. The Mississippi Supreme Court denied relief, relying on three affidavits from state-affiliated medical professionals. After the district court denied Simon's *Ford* petition, the Fifth Circuit granted a stay for numerous reasons. First, it ruled that Simon had made a sufficient threshold showing of incompetence under *Panetti* – in essence, a *prima facie* showing of incompetence – and the state court appeared to require a higher showing. Second, it was questionable for the state court to look beyond Simon's evidence in order to determine whether Simon had made the required showing. Third, any deficiencies in Simon's showing were created by the State, which denied him the opportunity to be examined by a non-state medical professional. Fourth, the state court objectively misread the medical records to show "normal neurological functioning at all times." For these reasons, Simon made sufficient showings that the state court ruling was an unreasonable application of clearly established federal law and an unreasonable determination of the facts. *See* 28 U.S.C. §§ 2254(d)(1)-(2). The court therefore stayed Simon's execution and ordered expedited briefing of the appeal.

United States v. Barnette, 644 F.3d 192 (4th Cir. 2011). In this capital direct appeal from a federal murder prosecution, the Fourth Circuit upheld the denial of relief following the U.S. Supreme Court's remand ordering further proceedings in light of *Miller-El v. Dretke*, 545 U.S. 231 (2005). During the initial appeal, the government's appendix included a juror questionnaire that contained hand-written notes of the prosecutors, designating the juror's race. On remand to the district court, the court conducted an *in camera* inspection of the prosecution's questionnaires, noticed that most of them designated the juror's race on the front page, and also found 48 questionnaires with "sticky notes" containing additional race-related notations. The Fourth Circuit upheld the district court's decision not to disclose the questionnaires or sticky notes to the defense, and to conduct the renewed *Batson* hearing without allowing defense counsel to cross-examine the prosecutors (who were questioned exclusively by the judge).

Lark v. Secretary, Pennsylvania Dept. of Corrections, — F.3d —, No. 07-9004, 2011 WL 2409297 (3d Cir. Jun. 16, 2011). The Third Circuit reversed the district court's grant of

relief on a *Batson* claim and remanded for further findings in this procedural quagmire of a capital case from Pennsylvania. *Batson* was issued after Lark's trial but before his convictions were affirmed on direct appeal. Following a protracted discussion of numerous procedural default issues – the details of which are beyond the scope of this newsletter – the Third Circuit ruled that the prisoner's claim should be reviewed *de novo* and without deference to the limited state-court adjudication. On the merits, the prosecutor was unable to remember any specific race-neutral reasons for striking numerous minority jurors, as the federal hearing was conducted several years after trial. Reversing the district court's grant of relief, the Third Circuit held that the prisoner was not automatically entitled to relief simply because of the State's failure to articulate race-neutral reasons at step 2 of the *Batson* process. *Cf. St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (employee not entitled to judgment simply because jury rejects employer's stated non-discriminatory reason for termination). The court remanded for a determination of whether Lark has carried his burden of proving intentional discrimination under all the circumstances.

Hurles v. Ryan, — F.3d —, No. 08-99032, 2011 WL 2641287 (9th Cir. Jul. 7, 2011). The Ninth Circuit ordered sentencing relief on a claim of judicial bias in this unusual Arizona case. Prior to trial, counsel for Hurles requested appointment of co-counsel. The trial judge not only denied that appointment, but also filed a brief and appeared as a party in opposition to Hurles' interlocutory appeal of the ruling. In that brief, the judge commented that the case was "very simple" because the prosecution's evidence of a "brutal murder" was "overwhelming," and she suggested that the attorney's request for co-counsel might be the result of counsel's lack of competence. Because the trial took place before *Ring v. Arizona*, the judge herself was the sole decisionmaker on all sentencing issues. As a threshold matter, the court ruled that AEDPA did not require deference to the factual question of the judge's bias. The post-conviction proceedings were held before the same judge, who denied a hearing on the claim and then interjected her own recollections as factual findings. Such defective proceedings, the court ruled, resulted in an "unreasonable determination of the facts" under 28 U.S.C. § 2254(d)(2), and required *de novo* review of the claim. On the merits, the court held that the judge's comments and adversarial role violated due process, and the contents of the interlocutory appellate brief could be attributed to the judge even if the brief was prepared by a member of the Arizona Attorney General's Office. The Court also provided helpful guidance concerning the need for effective counsel in supposedly "open and shut" cases: "That the prosecution appeared to have a strong case for guilt does not render the defense's job easier or 'simpler.' To the contrary, the more evidence the prosecution has, the more challenging it would be for the defense to put on a good case."

Harper v. Ercole, — F.3d —, No. 10-178-pr, 2011 WL 3084962 (2d Cir. Jul. 26, 2011). The Second Circuit reversed the district court's dismissal of Harper's habeas petition as untimely, ruling that equitable tolling was warranted in this non-capital case. During the year in which Harper could have filed his petition, he was hospitalized for a three-month period in which he underwent six separate surgeries, was heavily medicated, and was otherwise incapacitated. The Second Circuit held that Harper's condition was an "extraordinary circumstance" justifying equitable tolling for those three months. Nevertheless, the district court ruled that Harper wasn't diligent *after* his release from the hospital, at which point Harper didn't file his petition until 65 days later. The Second Circuit rejected this reasoning, pointing out that Harper was entitled to a full years' time, and that if the limit was tolled during the hospitalization, he still had 78 days to file for relief.

Roth v. United States Department of Justice, 642 F.3d 1161 (D.C. Cir. 2011). In this FOIA case, the D.C. Circuit held that it was improper for the FBI to issue a "Glomar response" to a request on behalf of a Texas death-row inmate, seeking FBI information on three drug-dealers who may have committed the quadruple homicide for which the prisoner was sentenced to death; that possibility is supported by two post-trial sworn statements that these three and a deceased partner actually committed the killings. A "Glomar response" is when the agency neither confirms nor denies whether it possesses the information – in this case, in order to protect the privacy interests of the three alternative suspects. The D.C. Circuit held that the public's interest in whether an innocent man is on death row, and whether the FBI has withheld exculpatory information from a man it helped local police and prosecutors put on death row, outweighed the privacy interests cited by the FBI. As a result, the FBI will have to at least state that it does or doesn't possess the requested records. It remains to be decided whether the records, if they exist, will be exempt from actual disclosure. In the meantime, the prisoner's execution has been stayed by a state court as he seeks DNA evidence that may also help to exonerate him.

McCarty v. Gilchrist, — F.3d—, No. 09-6220, 2011 WL 3243008 (10th Cir. Jul. 14, 2011). The Tenth Circuit affirmed the dismissal of this section 1983 case brought by an Oklahoma prisoner who spent 19 years on death row for a crime he didn't commit, owing to forensic evidence falsified by the now-infamous Joyce Gilchrist. The court first rejected McCarty's claim of malicious prosecution, holding that the state had probable cause to prosecute McCarty even without the doctored forensic evidence. McCarty's remaining claims charged Oklahoma City and its police department with failing to train or supervise Gilchrist. Those claims were time-barred, the Tenth Circuit ruled, because they were not brought within two years of the time that a state appellate court affirmed the grant of post-conviction relief. The Tenth Circuit rejected

McCarty's argument that the statute didn't run until the state appellate court issued its mandate.

Browning v. Workman, No. 07-CV-16-TCK-PJC, 2011 WL 2604744 (N.D. Okla. Jun. 30, 2011) (unpublished). The district court granted relief on a *Brady* claim in this Oklahoma death penalty case. Browning was convicted of trying to kill his then-girlfriend, and successfully killing her parents. The surviving girlfriend's testimony was critical, as no physical evidence linked Browning to the crime, and Browning's defense was that the ex-girlfriend conspired with another individual to carry out the killings. Prior to trial, the girlfriend's attorney sent the prosecutor records of the witness's mental health treatment. Those records were sealed from the defense, and on appeal, the state court ruled that they contained "nothing exculpatory." The federal court nevertheless inspected the records in camera on habeas review, and they revealed that the girlfriend suffered from severe mental illness, memory deficits, poor judgment, trouble distinguishing reality from fantasy, and that she was manipulative and potentially dangerous. Because the records revealed evidence that was relevant to the witness's credibility, and because her testimony was key to Browning's conviction, the district court granted the writ and ruled that the state court opinion was an unreasonable application of *Brady*.

Cooey v. Kasich, Nos. 2:04-cv-1156, 2:09-cv-242, 2:09-cv-823, 2:10-cv-27, 2011 WL 2681193 (S.D. Ohio Jul. 8, 2011) (unpublished). A federal district court stayed the execution of prisoner Kenneth Smith, finding that Ohio's lethal injection protocol is really no "protocol" at all, because the state's executioners see it as a set of unenforceable "guidelines." Among other problems, it was documented that, during a previous execution, the State allowed a person who was not a member of the execution team to start the prisoner's IV. Deviations from the state's protocol have become "a matter of policy," the court ruled. The court issued a stay, reasoning that Smith and the other plaintiffs were likely to prevail on their equal protection claim. "Defendants' steadfast refusal to recognize core deviations as problematic subverts the purpose of the written protocol and defies the point of the protections that the Fourteenth Amendment provides to all citizens. Defendants mistake semantics for propriety and in doing so conflate situational dedication to a governmental function with their overarching duty to follow the law. They posit that because their own written protocol is merely a set of guidelines subject to context-dependent variable implementation, any departure is not a deviation but actually continued application of the protocol. This approach misreads the protocol and ignores equal protection. A deviation is a deviation, and to claim otherwise is either delusional or disingenuous. Ohio can and should easily do better." The state, for its part, has chosen not to appeal the ruling, and instead to address the problems identified in the court's order. Ohio executions are on hold pending that process.

MISSOURI SUPREME COURT DECISIONS

State ex rel. Griffin v. Denney, — S.W.3d —, No. SC91112, 2011 WL 3298956 (Mo. Aug. 2, 2011). In this prison murder case, the Missouri Supreme Court granted habeas relief to former death-row inmate Reginald Griffin. Convicted and sentenced to death in 1987, Griffin was re-sentenced to life after it was discovered that the jury considered the criminal history of a different individual named "Reginald Griffin." *See State v. Griffin*, 848 S.W.2d 464, 471 (Mo. 1993). In the present case, the court granted relief on a *Brady* claim, finding that the prosecution failed to disclose that prison guards had seized a sharpened screwdriver from a prisoner who was running from the area after the murder. The court's discussion of prejudice is particularly illuminating. Of note, the majority held that it must consider the probative force of not only the withheld evidence, but also other exculpatory (but non-*Brady*) evidence that had come to light since the time of trial. That evidence included a recantation by one of the two snitch-witnesses who testified at trial, a thorough discrediting of a second snitch-witness who died before trial but whose deposition was presented to the jury, and a third prisoner's confession to the stabbing at issue during Griffin's original Rule 29.15 proceedings. Within 60 days of the mandate, the state must either release Griffin or file a notice of its intent to retry him. Judge Russell dissented, joined by Judges Fischer and Price. Limiting itself to the *Brady* evidence, the dissent argued that the withheld screwdriver was not itself material, because the state's evidence showed a stab wound whose length was inconsistent with a screwdriver.

State ex rel. Taylor v. Steele, 341 S.W.3d 634 (Mo. 2011). By a 4-3 vote, the Missouri Supreme Court denied habeas corpus relief to death-sentenced prisoner Michael Taylor. In 1991, Taylor pled guilty to a murder and kidnapping in Jackson County in 1989. On state habeas, Taylor argued that *Ring v. Arizona*, 536 U.S. 584 (2002), entitled him to a jury determination of the facts underlying his death sentence, including the existence of aggravating factors, whether the aggravators "warrant" a death sentence, and whether mitigating factors outweigh the aggravators. The court had earlier held *Ring* retroactive to other Missouri death penalty cases. *See State v. Whitfield*, 107 S.W.3d 253 (Mo. 2003). Nevertheless, the court limited *Whitfield* to cases in which a jury has deadlocked during sentencing deliberations so that its factual findings are unclear. The court also held that Taylor's 1991 guilty plea effectively waived his right to have a jury find the facts needed for a death sentence; the court described the plea as a "purposeful, strategic acquiescence to be sentenced by a judge, instead of by a jury." Finally, the court ruled that its newly-expanded means of proportionality review does not apply retroactively to defendants who were sentenced before the court's 2010 decisions in *Anderson*, *Deck* and *Dorsey*. Judge Stith strenuously dissented, arguing that Taylor

in 1991 could not have waived a constitutional right that did not yet exist (*see Halbert v. Michigan*, 545 U.S. 605, 623 (2005)); that the plea colloquy did not affirmatively show that Taylor wanted to avoid a jury trial on punishment or that he knew he could have requested one; that the *Whitfield* retroactivity cases were always based on the jury's failure to find the necessary facts for a death sentence and not on the mere fortuity of a "deadlock"; and that the majority was violating equal protection principles by applying *Ring* retroactively as to some defendants but not others.

State v. Nunley, 341 S.W.3d 611 (Mo. 2011). A 4-3 majority of the Missouri Supreme Court denied Roderick Nunley's motion to recall the mandate, which raised *Ring* issues similar to those of Nunley's accomplice, Michael Taylor. As with Taylor, the court ruled that Nunley waived his right to jury sentencing when he pled guilty, and that the waiver remained valid even after Nunley's sentence was vacated and remanded for re-sentencing before a different judge – despite Nunley's argument that he intended to be sentenced by the judge before whom he pled guilty. The court more generally ruled, as in *Taylor*, that *Ring* does not apply retroactively to cases in which the defendant has pled guilty, and that Nunley understood during the plea proceedings that he was waiving a "constitutional" right to jury sentencing (even though no such right existed at the time).

Burgess v. State, — S.W.3d —, No. SC91571, 2011 WL 2848393 (Mo. Jul. 17, 2011). In this interesting non-capital post-conviction case, the Missouri Supreme Court sidestepped the issue of whether a defendant may waive post-conviction remedies as part of his or her guilty plea. The opinion does not disagree with Formal Opinion 126 of the Missouri Supreme Court's Advisory Committee. The Formal Opinion states that defense counsel must not advise the client to waive post-conviction remedies, because the counsel cannot render competent and non-conflicted advice concerning the lawyer's own representation. Likewise, prosecutors should not seek such waivers as a condition of plea agreements; such conduct is "inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice." In Burgess's case, though, he pled guilty to a weapons offense and waived Rule 24.035 remedies before the Formal Opinion was issued. The Missouri Supreme Court did not resolve whether his waiver was valid, but instead remanded to the circuit court, which had not entered findings of fact and conclusions of law explaining why Burgess isn't entitled to relief.

State v. Nash, 339 S.W.3d 500 (Mo. 2011). The Missouri Supreme Court unanimously upheld the capital murder conviction and life sentence of Donald Nash for a 1982 homicide. Among other claims, the court rejected a due process attack on Missouri's "direct connection rule," which bars evidence of third-party guilt unless the evidence "directly connects the other person with the corpus delicti." The rule does not violate the holding of *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Missouri Supreme Court explained, because that decision did not intend to question "widely accepted" rules that judges may exclude evidence that is "only marginally relevant" or threatens a "confusion of the issue." The court upheld the exclusion of evidence that one Anthony Feldman left his fingerprints on the decedent's car, that he falsely told the police he had never met the victim, that he had a stalking conviction from Iowa, that he was known to carry a shotgun in his vehicle (the decedent was killed by a shotgun wound to the neck), and that he killed himself with a shotgun in 2008.

State v. Brown, 337 S.W.3d 12 (Mo. 2011). A 5-2 majority of the Missouri Supreme Court reversed Anthony Brown's conviction of second-degree murder in this self-defense case from St. Louis. As part of his claim of self-defense, Brown presented evidence that the victim was carrying a 0.38 revolver in the pocket of his sweatpants, and that the gun fit into the pocket in a particular way. The gun itself was never found or offered into evidence. Nevertheless, during closing argument, the prosecutor was allowed to use a "sample" revolver in order to demonstrate that the gun couldn't have fit into the pocket in the manner described by Brown and defense witnesses. It was reversible error for the court to allow this demonstration, in the absence of any evidence that the "sample" gun matched the size and other characteristics of the actual one. The court also noted that the jury asked to see the "sample" gun during its deliberations, which highlighted the prejudice to Brown. The dissent, for its part, appears to have forgotten that the State bears the burden of disproving a claim of self-defense beyond a reasonable doubt: "[T]he question before this Court is whether the trial court abused its discretion in allowing the State to use the gun as a prop during closing argument and whether the jury would have ***bought*** Brown's self-defense ***story*** had the trial court prohibited the demonstration." *Id.* at 16 (Fischer, J., dissenting) (emphases added).

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

State v. Ellis, 799 N.W.2d 267 (Neb. 2011). The Nebraska Supreme Court unanimously affirmed the murder conviction and death sentence of Roy Ellis in this direct appeal involving the rape and killing of a 12 year-old girl outside of Omaha. The court ruled that the trial court abused its discretion by allowing the prosecution to present guilt-phase evidence that Ellis had previously raped his two stepdaughters some ten years before the crime. Nevertheless, the error was held harmless in light of the state's strong evidence of guilt, including evidence that Mr. Ellis's DNA was found on the victim's clothes, and that Mr. Ellis made various incriminating statements while he was in jail on other charges. The court

also rejected numerous other claims, including an attack on the prosecution's snitch testimony, and a series of *Ring* claims attacking Nebraska's unique statute under which a jury determines only the existence of aggravating circumstances and a panel of three judges determines the sentence by weighting the aggravators against any mitigators.

Stripling v. State, 711 S.E.2d 665 (Ga. 2011). In this interlocutory appeal during the pendency of a defendant's retrial, the Georgia Supreme Court upheld the constitutionality of a statute requiring the defendant to prove mental retardation "beyond a reasonable doubt" in order to avoid imposition of the death penalty. Georgia stands alone in requiring such proof, which, the dissent warns, could easily lead to the execution of those with "mild" mental retardation. [Editor's note: A recent study supports the dissent's concern. *See* Marcus T. Boccaccini et al., *Jury Pool Members' Beliefs about the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for Atkins-Type Cases*, 34 Law & Psychiatry Review 1 (2010).]

Ballard v. State, — So. 3d —, No. SV08-2041, 2011 WL 2566348 (Fla. Jun. 30, 2011). The Florida Supreme Court held the defendant's death sentence to be disproportionate in this direct appeal. The court noted that the case featured only a single aggravating circumstance, which is that the murder was "cold, calculated, and premeditated." The defendant had purchased the murder weapon (a metal pipe) some ten days before the crime, and he otherwise planned the killing elaborately; the victim was the mother of Ballard's step-daughter, with whom he was having an incestuous sexual relationship. Nevertheless, the trial court found three mitigators: Ballard was under an extreme mental or emotional disturbance, he was impaired in his ability to conform his conduct to the requirements of law, and he committed the offense while at the relatively advanced age of 65. In reducing Ballard's sentence, the majority noted that "the death penalty is reserved only for those circumstances where the most aggravating and the least mitigating circumstances exist."

Scott v. State, — So.3d —, No. SC09–1578, 2011 WL 2566387 (Fla. Jun. 30, 2011). In this murder-robbery case involving a holdup at a laundromat, the Florida Supreme Court held the death sentence to be disproportionate. The case involved two aggravating circumstances, but neither one was particularly aggravating under the facts of the case. First, Scott was found guilty of a previous violent crime, but that "previous" crime was an assault occurring in the course of the robbery, when Scott struck a bystander with the butt of his gun. Second, the aggravating circumstance that the murder occurred during a robbery was mitigated by the fact that Scott did not intend to kill anyone when he began the robbery, and also that the victim was charging at him with a chair when Scott shot him. Despite relatively meager trial mitigation, the court ruled that Scott's crime "was not among those for which the death penalty is specifically reserved."

Coleman v. State, — So.3d —, Nos. SC04-1520, SC09-92, 2011 WL 2149983 (Fla. Jun. 2, 2011). In yet another Florida victory, the state supreme court reduced the defendant's death sentence to life imprisonment on a *Wiggins* claim. Counsel performed essentially no penalty phase investigation, claiming that he concentrated on the guilt phase because the client gave him an alibi. The court rejected the State's argument that counsel reasonably limited his investigation in accordance with Coleman's wishes, pointing out that Coleman never impeded a penalty phase investigation or told counsel not to pursue one. On post-conviction, Coleman presented evidence of his impoverished background, poor parenting, riots and violence in his neighborhood, poly-substance abuse, sexual abuse, a head injury, and mental illness. Considering that the original jury recommended a life sentence by a six-to-six vote, the court reasoned that the additional mitigating evidence would have precluded the trial judge from overriding the jury's recommendation as he did. An override is permitted only when the record bears no reasonable basis for upholding the recommendation; the omitted mitigation in this case would have provided such a basis as a matter of law.

Hall v. State, 253 P.3d 716 (Idaho 2011). In this interlocutory appeal, the Idaho Supreme Court upheld the trial court's order prohibiting a death-sentenced defendant's attorney from contacting the jurors without prior leave of court. No state or local rule prohibited such contact, but the court held that the trial court had inherent authority to rule as it did. The court also rejected Hall's claim that the order violated his attorneys' First Amendment rights.

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