

OPD Death Penalty Report First Quarter 2008

1. Executions

There were no executions during this quarter.

Death row inmate **James Taylor** (Greene County) died of natural causes on January 30.

2. Execution Alerts

No executions are schedule in this quarter.

John Spirko (Van Wert County) avoided execution when Governor Strickland commuted his sentence to life without parole on January 9.

3. Capital Trials

The capital defense bar was successful in limiting the number of death row inmates during this quarter. The trial bar obtained excellent results through plea bargaining and litigation.

Chris Ballard (Hamilton County) avoided the death penalty by pleading to aggravated murder and was sentenced to 45 years on February 18, 2008. He was represented by attorneys Norman Aubin and Steven Wenke.

Jeffrey Braun (Cuyahoga County) was sentenced to LWOP on February 12, 2008 following a jury trial. He was represented by attorneys John Gibbons and John Parker.

Bobby Cutts, Jr. (Stark County) on February 27, 2008 was sentenced to 57 years to life with the possibility of parole following a jury trial. He was represented by attorneys Carolyn Ranke and Fernando Mack.

Fred Johnson (Hamilton County) avoided the death penalty on February 19, 2008 when a jury convicted him of non-capital murder. Johnson was sentenced to 23 years to life and was represented by attorneys Elizabeth Agar and Herbert Freeman.

Carl Kahoon (Cuyahoga County) avoided the death penalty after pleading guilty to two counts of aggravated murder. He was sentenced to LWOP on February 14, 2008. Kahoon was represented by attorneys Tom Shaughnessy and James Kersey.

Glenn McCoy (Muskingum County) was sentenced to life without parole after a jury trial. McCoy avoided the death penalty because the court determined that he is ineligible for the death penalty because he is mentally retarded. McCoy was represented by attorneys Rick Ketchum and Don Schumacher. (See Section 6.1 below.)

Joseph McGowan (Cuyahoga County) was sentenced on February 21, 2008 to life with the possibility of parole after 25 years following his guilty plea to aggravated murder. He was represented by attorneys David Grant and Russell Tye.

Kenneth Richey (Putnam County) secured his release from death row by pleading to involuntary manslaughter on January 7, 2008. Based on his time served, Richey's plea allowed him to return to Scotland without serving any additional time. Richey was represented by attorney Ken Parsigian of the Boston law firm Goodwin Proctor and Assistant State Public Defender Gregory Meyers. Assistant State Public Defender Kelly Culshaw, Mitigation Specialist Dorian Hall, and Investigator Kelly Heiby of the Public Defender's office also aided in Richey's defense.

Scott Ritchie (Richland County) on March 19, 2008 avoided the death penalty following a guilty plea to murder. He was represented by Assistant State Public Defenders Gregory Meyers and Jerry McHenry. Assistant State Public Defender Kim Rigby and Mitigation Specialist Jessica Love of the Public Defender's office also aided in Ritchie's defense. (See also section 6.1, below.)

Wilson Santiago (Cuyahoga County) avoided a possible death sentence after pleading guilty to the aggravated murder of a police officer. The three-judge panel sentenced him to LWOP on January 30, 2008. Santiago was represented by attorneys John Luskin and Robert Tobik.

Adam Scott (Preble County) pleaded guilty to aggravated murder with capital specifications and was sentenced to 20 to life on March 13, 2008. He was represented by attorney John Rion.

Michael Shine (Cuyahoga County) on February 5, 2008 pleaded guilty to aggravated murder and was sentenced to 40 to life. Attorneys Jeffrey Saffold and Anthony Kellon represented Shine.

Derris Smith (Hamilton County) avoided a possible death sentence following his plea to a non-capital murder. On February 12, 2008 he was sentenced to 31 years to life. He was represented by attorneys Gerald Krumplebeck and Margaret Allen.

Randall Thomas (Trumbull County) avoided a possible death sentence on February 5, 2008 after pleading to aggravated murder without specifications. He received a sentence of 30 to life. He was represented by attorneys Anthony Consoldane and James Lewis.

Cameron Williams (Summit County) on March 17, 2008 received a sentence of life with the possibility of parole after 69 years after a jury trial. He was represented by attorneys Kerry O'Brien and John Greven.

Unfortunately, one person received the death penalty in this quarter. **Philip Jones** (Summit County) was sentenced to death on January 30, following a jury trial. He was represented by attorneys Donald Hicks and Kerry O'Brien.

4. Direct Appeal Decisions

State v. Roland Davis (Licking County). The Ohio Supreme Court affirmed Davis's convictions and death sentence on January 3, in an opinion authored by Justice O'Connor. Davis became a suspect in the aggravated murder of an elderly Newark woman nearly four years after the crime. Davis became the prime suspect based on DNA testing of a small amount of genetic material found at the crime scene. Davis was indicted for felony capital murder with multiple aggravating circumstances, including, aggravated burglary, aggravated robbery, kidnapping. He was convicted of all charges and sentenced to the death penalty following a jury trial.

Davis argued in this appeal that his right to a public trial was violated “because the tape recording of his interview [with the Newark police] was not played in open court.” The court rejected this claim, finding that “the trial court never closed the courtroom during the trial[,]” and Davis failed to preserve this claim by not objecting to the procedure followed by the trial court.

Davis also argued in his appeal that his tape-recorded statements to the police were admitted in evidence “without identification or authentication....” The court denied this claim based on defense counsels’ “agreement to admit the tape recordings into evidence,” thus eliminating “the need to authenticate the tapes before they were introduced into evidence....” The court also rejected Davis’s claim that his counsel were ineffective by agreeing to this procedure. “By introducing the tapes, counsel had the benefit of presenting Davis’s proclamations of innocence to the jury, without the risk of having Davis take the stand.”

Justice Pfeifer dissented. He stated that there was insufficient evidence to support the kidnapping conviction and the capital specification based on kidnapping. In Justice Pfeifer’s view, the restraint of the victim was merely incidental to the restraint necessary to commit the aggravated murder.

Davis was represented in this appeal by attorneys Carol Wright and David Stebbins.

5. Federal Habeas Decisions

The Sixth Circuit issued decisions on four Ohio capital habeas appeals during this quarter, granting relief in two of them.

That court also granted the State’s request for en banc review in **William Garner’s** habeas appeal. Garner previously won relief in the Sixth Circuit on his claim that his waiver of Fifth Amendment rights under Miranda was not made knowingly and intelligently.

The Supreme Court also denied **Jason Getsy’s** petition for certiorari. An en banc panel of the Sixth Circuit held that Getsy was not entitled to have his death sentence vacated on his claim that his sentence was disproportionate to the life sentence that his co-defendant received.

5.1 Sixth Circuit

Michael Bies v. Bagley (Hamilton County). The court affirmed the district court’s grant of the writ in an opinion authored by Judge Clay and joined by Judges Daughtrey and Moore on February 27. The court held that the Double Jeopardy Clause barred the State from relitigating findings made by the state courts at trial and on direct appeal that Bies is mentally retarded.

Bies was represented in this appeal by Assistant State Public Defender Randall Porter and attorney S. Scott Haynes.

Reginald Brooks v. Bagley (Cuyahoga County). The court affirmed the district court’s denial of habeas relief in this case on January 22. The opinion was authored by Judge Sutton and joined by Judges McKeague and Griffin. The court found that Brooks was not deprived of the effective assistance of counsel in the penalty phase of his 1983 trial.

The court found no merit to Brooks’ claims that his counsel failed to adequately prepare a mental health expert retained by defense counsel for mitigation. Nor did the court find merit to the claim that defense counsel failed to properly investigate Brooks’ background and present

mitigation evidence aside from evidence of Brooks' competency. The court also held that the state post-conviction court's alternative merits decision (alternative to finding Brooks' claims procedurally defaulted) was entitled to deference under the AEDPA.

Brooks was represented in this appeal by attorneys Michael Benza and Alan Rossman.

John Fauntenberry v. Mitchell (Hamilton County). The court affirmed the district court's denial of habeas relief on January 25. Judge Batchelder's opinion was joined by Judge Gilman. The court rejected Fauntenberry's claim that his counsel failed to investigate and present evidence of organic brain damage. The court explained that defense counsel hired an expert "for the express purpose of conducting a neuropsychological examination—the most effective means possible of determining whether Fauntenberry had a brain impairment. But Fauntenberry refused to submit to the examination."

Judge Moore dissented, finding that defense counsel rendered ineffective assistance to Fauntenberry in the penalty phase. She argued that "in the face of numerous indicators of brain damage, [counsel] inexcusably failed to ensure that their expert actually tested for the organic brain disorder that she claimed to be unable to find.... [S]imply presenting an expert who is a doctor does not absolve counsel from an obligation to grasp the bare rudiments of the expert's testimony."

Fauntenberry was represented in this appeal by attorney Dennis Sipe.

Frank Spisak v. Hudson (Cuyahoga County). The court ordered a new penalty phase in this case on January 11, in a per curiam opinion issued by Judges Martin, Moore, and Clay. Spisak won relief in his habeas appeal to the Sixth Circuit in October 2006. But the Supreme Court granted certiorari and remanded for the Sixth Circuit to consider its order in light of additional authority from the Supreme Court.

On remand, the Sixth Circuit again held that Spisak's counsel had rendered ineffective assistance in the penalty phase because of his "counsel's outrageous remarks during closing arguments." The court reasoned that, even in light of the additional Supreme Court precedent, habeas relief was warranted because Spisak's counsel had given "credence to the aggravating evidence presented by the prosecution by essentially describing [Spisak] as a monster."

Judge Moore concurred with the court's decision to grant relief. But she dissented on the ground that Spisak was denied a fair trial when evidence supporting his insanity defense was excluded at trial.

5.2 District Court

Billy Joe Sowell v. Anderson (Hamilton County). Judge Sargus ordered that Sowell is entitled to a new penalty phase based on ineffective assistance of counsel for failing to investigate and present mitigation evidence.

Sowell is represented by Assistant State Public Defender Randall Porter and attorneys Mark Vander Laan and Chris McDowell.

Michael Stallings v. Bagley (Summit County). Judge O'Malley ordered a new penalty phase on March 31, based on ineffective assistance of counsel for failing to investigate and present mitigation evidence.

Stallings is represented by Assistant State Public Defenders Rachel Troutman and Joseph Wilhelm.

6. Special Issues In Capital Cases

6.1 Mental Retardation

Two capital defendants avoided the possibility of execution during this quarter by virtue of their successful pre-trial litigation of mental retardation claims. A third defendant won relief on his mental retardation claim in his federal habeas appeal.

Michael Bies (Hamilton County) obtained relief from his death sentence on February 27 when the Sixth Circuit ordered habeas relief based on Bies's claim that he was mentally retarded. That court agreed with Bies that the Double Jeopardy Clause barred the State from relitigating the issue of mental retardation. State court opinions had described that Bies as being mentally retarded. Bies was represented by Assistant State Public Defender Randall Porter and attorney S. Scott Haynes.

Glenn McCoy (Muskingum County) was sentenced to life without parole after a jury trial. McCoy avoided the death penalty because the court determined that he is ineligible for the death penalty because he is mentally retarded. McCoy was represented by attorneys Rick Ketchum and Don Schumacher.

Scott Ritchey (Richland County) was indicted with aggravated murder with specifications. However, based on the opinions of experts for both the defense and prosecution, the trial court found that he is ineligible for the death penalty because he is mentally retarded. Ritchey's trial team then got the State to reduce the charge so that he could plead guilty to murder on March 19. He was represented by Assistant State Public Defenders Gregory Meyers, Jerry McHenry, Kim Rigby, and Mitigation Specialist Jessica Love of the Public Defender's office.

Michael Stallings (Summit County) was denied relief on habeas by the district court on March 31. The state trial court found that Stallings met two of the prongs necessary to qualify as mentally retarded. But that court held that Stallings could not provide sufficient proof that his low IQ and adaptive skills deficits onset before age 18. The district court said that its own view of the evidence might be different if the factual question of mental retardation was before it in the first instance. However, the district court concluded that it was constrained under the AEDPA to defer to the state court's factual finding that Stallings was not mentally retarded by age 18. Stallings was represented by Assistant State Public Defenders Joseph Wilhelm and Rachel Troutman.

6.2 Lethal Injection Litigation

An evidentiary hearing is scheduled for April 7 and 8 in the Lorain County common pleas court on the validity of Ohio's lethal injection procedures. The case is **State v. Ruben Rivera**. Riveria is represented by Ohio ACLU Legal Director Jeff Gamso and attorney Kreig Brusnahan.

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