

OPD Death Penalty Report Second Quarter 2007

1. Executions

James Filiaggi (Lorain County) was executed on April 24. Filiaggi's federal habeas appeal was rejected by the Sixth Circuit in 2006. Filiaggi moved to intervene in the lethal injection suit on April 19 of this year. (See section 6.2, *infra*.) However, Filiaggi was unable to get an injunction against his death sentence by the federal district court. He was unable to exhaust the prison's administrative remedies between the time he moved to intervene and his execution—which is a prerequisite to joining the lawsuit. Moreover, Filiaggi's attempt to join the lawsuit was deemed untimely under the equitable principles that the federal district court considered in deciding whether to grant the injunction. Filiaggi was represented by Jeff Gamso.

Christopher Newton (Richland County) was executed with considerable difficulty on May 24. Newton was convicted and sentenced to death for killing his cellmate in the Mansfield Correctional Institution in 2003. He pleaded guilty and later waived collateral review after being found competent in the trial court. It took nearly two hours to execute Newton, resulting from difficulties the prison staff had inserting the shunts into his arms. This was the longest attempt to execute a person yet recorded in Ohio. Newton had no history of intravenous drug use; however, his portly body type made it very difficult for the prison staff to locate the veins in his arms. Additionally, Newton's chest heaved up and down several times and his mouth twitched after the masking drug had been administered. The bodily movements and facial twitching observed during this execution raise concerns about whether the dose of fatal drugs was calibrated to account for Newton's large size (265 pounds). Newton was represented by Assistant State Public Defenders Robert Lowe and Joseph Wilhelm.

2. Execution alerts

Romell Broom (Cuyahoga County) has an execution date of October 18, 2007.

3. Trials with capital indictments

Lorenzo Collins (Cuyahoga County) was sentenced to life with the possibility of parole on April 2, following a jury trial. He was represented by attorney Harvey Bruner (retained counsel).

Lindsey Bruce (Franklin County) was sentenced to LWOP on April 5, following a jury trial. Bruce was represented by attorneys Don Schumacher and Crysta Pennington.

George Franklin (Hamilton County) was sentenced to life with the possibility of parole on April 5, following a guilty plea to a three-judge panel. Franklin was represented by Assistant State Public Defender Greg Meyers, attorney Will Welsh, and OPD mitigation specialist Marcia Dukes.

Frank Stolicny (Stark County) was sentenced to life with the possibility of parole on April 16, following a guilty plea to a three-judge panel. He was represented by attorneys Frank Beane and Jean Madden.

Eric Hockman (Fairfield County) was sentenced to LWOP following a guilty plea to a three-judge panel on April 26. He was represented by attorneys Javier Armengau and Andrew Stevenson.

Reginald Wilmore (Cuyahoga County) was sentenced to life with the possibility of parole on April 27, following a jury trial. He was represented by attorneys Brian Fallon and Tom Shaughnessy.

Jacob Cifeli (Cuyahoga County) was sentenced to LWOP on May 1, after pleading guilty to a three-judge panel. He was represented by attorneys Fernando Mack and Myron Watson.

Richard Segines (Cuyahoga County) was sentenced to life with the possibility of parole on May 15, following a jury trial. He was represented by attorneys Douglas Glenn and Edward Mullin.

Sharon Jean Dockery (Cuyahoga County) pleaded guilty to involuntary manslaughter on May 17. She was represented by Ralph DeFrance and James Jenkins.

Miquel Rodrigues (Franklin County) pleaded guilty to voluntary manslaughter on May 23. He was represented by attorneys Todd Barstow and Nancy Wonnell.

Lamont Hunter (Hamilton County) was found guilty of aggravated murder, rape, and child endangering by a three-judge panel on June 15. The mitigation phase is scheduled for July 19. He is represented by attorneys Norman Aubin and Clyde Bennett.

RayTone Wilson (Delaware County) pleaded guilty to straight murder on June 15. He was represented by Assistant State Public Defenders Bill Mooney, Jerry McHenry, and Brie Friedman, and OPD mitigation specialist Jessica Love.

Richard Joseph (Allen County) was re-sentenced to life with the possibility of parole on June 13. He was represented by Assistant State Public Defender Randall Porter and attorney Edmund Searby.

4. Direct appeals decisions

There have been no capital direct appeal decisions issued in this quarter.

5. Federal habeas

5.1 Sixth Circuit decisions

Richard Nields v. Bradshaw. The Sixth Circuit affirmed the denial of habeas relief on April 6, in a unanimous opinion authored by Judge Gilman and joined by Judges Boggs and Sutton. Nields was convicted and sentenced to death in Hamilton County in 1997 for killing his domestic partner after a long period of domestic turmoil. Nields got very drunk, entered his girlfriend's house, and following an argument, beat and choked the victim. Nields' offense was elevated to a capital crime by an aggravated robbery since he took some of the victim's property after killing her.

In Nields' habeas appeal, he argued that his trial counsel were ineffective by not presenting mitigating evidence of his "chaotic and neglectful" upbringing, good character evidence and evidence of the effects of Nields' alcohol addiction. The court rejected these claims, finding that

the undiscovered mitigating evidence was “relatively weak” or “largely cumulative of what [was presented] at trial.”

Regarding Nields’ eligibility for the death penalty, the court noted in dicta that “the circumstances of this case just barely get Nields over the threshold under Ohio law.” And on direct appeal, Justice Pfeifer dissented under the Ohio Supreme Court’s independent sentence assessment based on concerns that the evidence of an aggravated robbery was too weak to support a death sentence. Justice Pfeifer reasoned that this case “is about alcoholism, rage, and rejection—and about Nields’ inability to cope with any of them. It is a crime of passion imbued with pathos and reeking of alcohol. It is a crime that is all too common, but in stealing some travelers checks, Nields bought himself a death sentence.” Nields was represented in this appeal by Assistant State Public Defenders Ken Lee and Kyle Timken.

Darryl Durr v. Mitchell. The Sixth Circuit affirmed the denial of habeas relief on April 26, in an opinion written by Judge Suhrheinrich and joined by Judge Batchelder. Judge Cole concurred in the judgment. Durr was sentenced to death in Cuyahoga County in 1988 for the rape and aggravated murder of a 16-year-old girl.

In this appeal, Durr challenged the sufficiency of the circumstantial evidence used to support the rape conviction. He also claimed that his trial counsel were ineffective in the mitigation phase because they failed to employ various experts. And Durr asserted that his due process rights were violated by prosecutor misconduct in the mitigation phase.

The court also found sufficiency of the evidence supporting the rape charge to be “a very close question, since there is absolutely no physical evidence of any penetration to affirmatively establish sexual conduct...” However, the court again noted that its review under the AEDPA “is very deferential to the state courts,” and thus the state appellate court’s decision on the merits was not an unreasonable application of federal law.

The court found no prejudice to Durr resulting from trial counsels’ failure to employ a cultural mitigation expert, a social worker, or an independent psychologist. The court noted that the phrasing used by one expert in her affidavit (“In my opinion”) necessarily failed to establish prejudice under the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

Durr made an unsworn statement to the jury in mitigation. The court found that it was improper for the prosecutor to comment on Durr’s failure to testify under oath, as those comments violated Durr’s rights under the Fifth Amendment. Although the issue was deemed by the court to be “close,” the court found the error to be harmless, especially in view of the deference under the AEDPA that was owed to the state appellate court’s merits review. In dicta the court cautioned prosecutors “to avoid such dramatic, needless errors.”

Judge Cole concurred in the judgment. He explained that because experts express themselves in opinion form it is not fatal to a habeas claim reviewed under *Strickland* for an expert to use phrases such as “in my opinion.” He also reasoned that although the evidence of the rape conviction was weak, habeas relief was still unwarranted in light of the deference to state opinions required by the AEDPA. Durr was represented in this appeal by attorneys Kathleen McGarry and Dennis Sipe.

Robert Van Hook v. Anderson. The Sixth Circuit sitting en banc reversed the judgment of the panel granting habeas relief to Van Hook based on a violation of his right to counsel under the Fifth Amendment. The decision of the court, issued on May 24, was authored by Judge

McKeague and joined by Judges Boggs, Batchelder, Gibbons, Rogers, Sutton, Cook, and Griffin. Judges Cole, Merritt, Martin, Daughtrey, Moore, Clay, and Gilman dissented.

Van Hook was sentenced to death in Hamilton County in 1985 for an aggravated felony murder. While in police custody in Florida, Van Hook asserted his Fifth Amendment right to cease questioning by the police without the assistance of counsel. The Florida police complied with his request. Later on, Van Hook was questioned by Cincinnati police officers, even though Van Hook had not personally reinitiated contact with law enforcement. The Cincinnati police claimed that Van Hook's mother conveyed a request from him to initiate questioning. Van Hook confessed to the Cincinnati police and the confession was admitted at trial, following an unsuccessful motion to suppress.

On direct appeal, the Ohio Supreme Court found that Van Hook had waived his right to counsel through his mother. In dissent, Justice Wright argued that there was no evidence to support a finding that Van Hook had in fact asked his mother to contact the police to initiate questioning.

A panel of the Sixth Circuit granted habeas relief to Van Hook based on a violation of the rule in *Edwards v. Arizona*, 451 U.S. 477 (1981), that police questioning must stop when the accused requests counsel, unless the accused personally initiates contact with the police. The court granted en banc review to examine the question of whether Van Hook had reinitiated contact through his mother as his third party agent.

A majority of the full court found no Fifth Amendment violation under *Edwards*. The court reasoned that "[t]here is no sound justification for reading the statement from *Edwards* that the suspect 'himself' must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk." Thus, "initiation can be communicated directly by the suspect or indirectly by the suspect through a third party." The court then found "no basis in the record to disturb [the] findings" made by the Ohio Supreme Court regarding the question of whether Van Hook had in fact used his mother to initiate contact with the police before he confessed.

Judge Cole dissented on the ground that only the suspect himself can initiate contact with the police after the suspect invokes his *Miranda* rights. He also argued that the facts do not support the majority's conclusion that Van Hook asked his mother to initiate contact with the police for him.

Judge Merritt also dissented. He reasoned that the record was inadequate to support findings that (1) Van Hook initiated contact with the police through his mother, (2) Van Hook's mother communicated an intention by Van Hook to talk to the police, and (3) the police were not responsible for prompting Van Hook's mother to seek his Fifth Amendment waiver. Van Hook is represented by attorneys Jim Owen and Keith Yeazel.

5.2 District court decisions

William Montgomery v. Bagley. Judge Solomon granted the writ to Montgomery (Lucas County) based on the State's failure to disclose evidence favorable to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963). The undisclosed evidence undermined the credibility of Montgomery's testifying accomplice, and it undercut the prosecutor's timeline of events. Montgomery is represented by attorneys Richard Kerger and Lori McGinnis.

6. Special issues in capital cases

6.1 Mental retardation

State v. Kevin Yarbrough (Shelby County). Yarbrough was sentenced to life without the possibility of parole for 30 years on April 6, following a finding by the trial court that he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 335 (2002). Following an evidentiary hearing, the trial court found that Yarbrough is mentally retarded by virtue of his significant deficits in adaptive skills and a low IQ—both of which onset while Yarbrough was a juvenile. Yarbrough was represented by Assistant State Public Defenders Greg Meyers, Robert Lowe, and Brie Friedman.

State v. Clifton White (Summit County). Oral argument was held in White's case in the Ohio Supreme Court on May 12. Despite IQ scores well below 70, the trial court denied White's *Atkins* claim by finding that he did not have deficits in adaptive skills. The Ninth Appellate District affirmed. The Ohio Supreme Court then accepted White's discretionary appeal. Assistant State Public Defender Kathryn Sandford argued on White's behalf. Assistant State Public Defender Richard Vickers also represents White on the brief.

State v. Darryl Gumm (Hamilton County). Gumm won final relief on his mental retardation claim in the state courts. Gumm previously won relief on his *Atkins* claim when the trial court found that he is mentally retarded, despite some IQ scores above 70. The First Appellate District affirmed, and the State filed a discretionary appeal to the Ohio Supreme Court. That court denied the discretionary appeal on June 6, preserving the relief granted to Gumm. Gumm was represented by attorney Kathleen McGarry.

6.2 Lethal injection

Richard Cooley's request for en banc review was denied by the Sixth Circuit on June 1. The Sixth Circuit then stayed the mandate to permit Cooley to file a petition for certiorari in the Supreme Court by August 30.

The en banc panel of the Sixth Circuit declined to review Cooley's appeal on the merits. The panel in Cooley's case found that his challenge to Ohio's lethal injection protocol is time-barred under the statute of limitations for claims filed under 42 U.S.C. §1983. According to the majority of that panel, the time for bringing a civil rights challenge to Ohio's lethal injection protocol under §1983 begins when the prisoner's direct appeal ends. Judge Gilman argued in dissent that the prisoner's §1983 claim is not ripe until he or she faces an imminent execution date, following review on federal habeas. Cooley was sentenced to death in Summit County in 1986. Cooley is represented by Assistant State Public Defenders Greg Meyers, Kelly Culshaw, and Kim Rigby.

Clarence Carter's execution date of July 10 was stayed by Judge Frost on May 31, following Carter's timely request to join the lethal injection suit. Carter is represented by Assistant State Public Defender Linda Prucha.

On June 25, Judge Frost granted permission for the following death row inmates to intervene in the lethal injection lawsuit: **Mark Wiles** (Portage County), **Kevin Keith** (Crawford County), **Billy Slagle** (Cuyahoga County), **Romell Broom** (Cuyahoga County), **Jason Getsy** (Trumbull County), and **Jonathan Monroe** (Franklin County).